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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THE DOW CHEMICAL COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rule stated by this Court in *Mastro Plastics v. Labor Board*, 350 U.S. 270—that a union does not waive its statutory right to strike in response to an employer unfair labor practice by agreeing to a contractual no-strike provision that does not expressly cover unfair labor practice strikes—is inapplicable when an adjudication of the unfair labor practice would implicate a question concerning the meaning of the collective agreement.

2. Whether a union's breach of a contractual no-strike provision entitles the employer unilaterally to cancel the entire collective agreement.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. The Facts	2
B. Proceedings Below	6
1. The Board's First Decision	6
2. The Court of Appeals' First Decision	7
3. The Board's Opinion on Remand	8
4. The Court of Appeals' Second Decision	10
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: Page

Arlan's Department Stores of Michigan, Inc., 133 NLRB 802 (1961) 6, 7, 8, 9
Brotherhood of Locomotive Firemen & Enginemen, Lodge 844 v. Kennecott Copper Corp., 338 F.2d 224 (CA 10 1964) 17
Children's Rehabilitation Center, Inc. v. Service Employees International Union, Local No. 227, 503 F.2d 1077 (CA 3 1974) 17
Dow Chemical Co. v. United Steelworkers of America, et al., 429 U.S. 834 8
Drake Bakeries Inc. v. American Bakery & Confectionary Workers, 370 U.S. 254 ..... 11, 15, 16
Marathon Elec. Mfg. Co., 106 NLRB 1171 (1953) ..*passim*
Mastro Plastics Corp. v. Labor Board, 350 U.S. 270 ..... *passim*
Minnesota Joint Board, Amalgamated Clothing Workers of America v. United Garment Manufacturing Co., 338 F.2d 195 (CA 8, 1964) 17
NLRB v. C & C Plywood, 385 U.S. 421 14
NLRB v. Northeast Oklahoma City Mfg. Co., 631 F.2d 669 (CA 10, 1980) 11, 14
NLRB v. State Electric Service, Inc., 477 F.2d 749 (CA 5, 1973) 12, 16, 17
Textile Workers v. Lincoln Mills, 353 U.S. 448.. 11, 15
Trailways of New England, Inc. v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees, 343 F.2d 815 (CA 2 1965), cert. denied, 382 U.S. 879 17
United Elec., Radio & Machine Workers v. NLRB, 223 F.2d 338 (CA DC 1955), cert. denied, 350 U.S. 981 ..... 7, 15
United Packinghouse Workers v. Needham Packing Co., 376 U.S. 247 ..... 11-12, 15, 16

TABLE OF AUTHORITIES—Continued

Page

Statutes:

National Labor Relations Act of 1935, as amended:

§ 7, 29 U.S.C. § 157 ..... *passim*
§ 8(a)(1), 29 U.S.C. § 158(a)(1) ..... *passim*
§ 8(a)(3), 29 U.S.C. § 158(a)(3) ..... *passim*
§ 8(a)(5), 29 U.S.C. § 158(a)(5) ..... *passim*

Labor Management Relations Act of 1947:

§ 301(a), 29 U.S.C. § 185(a) ..... *passim*

Miscellaneous:

Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich.L.Rev. 1 (1958) 17
Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif.L.Rev. 663 (1973).. 17
Summers, Collective Agreements and the Law of Contracts, 78 Yale L.J. 525 (1969) 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *Dow Chemical Co. v. National Labor Relations Board*, 636 F.2d 1352.

OPINIONS BELOW

The first decision and order of the National Labor Relations Board in this case and the decision of the Administrative Law Judge are reported at 212 NLRB 333, and are reprinted in a separately bound Appendix hereto as App. E (App. 121a-128a) and App. F (App. 129a-155a), respectively. The first decision of the court of appeals is reported at 530 F.2d 266, and is reprinted as App. D (93a-120a). The decision and order of the National Labor Relations Board on remand are reported at 102 LRRM 1199, and are reprinted as App. C (28a-

92a). The second decision of the court of appeals—the decision from which certiorari is sought—is reported at 636 F.2d 1352, and is, together with the court's judgment, reprinted as App. A (1a-25a).

JURISDICTION

The court below issued its opinion in this case on November 26, 1980, and its judgment on January 26, 1981 (App. A 25a). That court issued an order denying a timely petition for rehearing on March 26, 1981. (A copy of that order is reprinted in the separately bound Appendix as App. B (27a)). On June 12, 1981, Mr. Justice Brennan entered an order extending the time for filing this petition to and including July 24, 1981. (A copy of that order is reprinted as App. G (156a)). This Court has jurisdiction to review the judgment of the Third Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 7, 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3), 158(a)(5), and § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), are reprinted in an appendix bound together with this brief.

STATEMENT OF THE CASE

A. The Facts

Beginning in 1954, and until the events that are the subject of this case, petitioner USWA [1] had been recog-

[1] At the time of the operative facts in this case, the employees at Dow's Allyn's Point plant were represented by the International Union of District 50, Allied and Technical Workers, Local 13744. Subsequently, that international union and its locals, including Local 13744, became a part of USWA. For the sake of simplicity, we shall refer to USWA as the union involved in this case.

nized by respondent Dow Chemical Company (hereinafter "the Company") as the exclusive bargaining agent for the approximately 145 production employees at the Company's Allyn's Point, Connecticut plant. During that period, the Company and USWA entered into a series of collective-bargaining agreements covering these Allyn's Point employees. The agreement pertinent to this case was to be effective, according to its terms, from February 23, 1970, to February 26, 1973.

In the Spring of 1971, the Company, without any prior discussion with USWA, determined to carry out a basic restructuring of the method of operation in the plant's latex department. The Company decided in May, 1971, to end the continuous operation of the department and instead to run the department only five days a week. App. 131a-132a.[2] Production on each shift was to be increased by 40 percent to make up for the two lost days of operation per week. JA 45a, 66a-69a, 167a, 294a, 297a-298a.[3]

The Company's decision had a number of significant implications for the employees in the latex department. The foremost such implication was that, because of the reduction in hours worked, the elimination of overtime, weekend, and holiday premiums, and the reclassification of jobs, each of these employees would suffer a substantial diminution of earnings. The Company at the hearing of this case estimated that each employee would earn approximately $570 a year less than before. App. 132a. Employee estimates of the diminution of earnings ran considerably higher: $1500-$2000 per employee per year. JA 149a-150a.

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[2] References to the appendix to this petition, which is separately bound, shall be in the form "App. ——."

[3] References to the joint appendix in the court below shall be in the form "JA ——."

On May 21, 1971, the Company announced its decision to restructure the latex department, stating that the change was to go into effect in ten days, on May 31, 1971. App. 133a. USWA in response "took the position that the matter was subject to negotiations." App. 133a. The Company replied that it would not negotiate as to this decision. App. 133a-134a. The Company remained adamant in its insistence on that position throughout the events that were to unfold. App. 134a-135a.

In an effort to secure an opportunity to negotiate over this issue, USWA invoked the contract grievance procedure. App. 134a-135a; JA 373a. The Company rejected the grievance through the first four steps of the grievance process, stating that the contract gave it the right to take such unilateral action. App. 143a-145a. Time was too short, however, to complete the grievance and arbitration process before the Company's unilateral action was to take effect. USWA requested that the date of implementation of the Company's change be postponed so that there would be time for the grievance and arbitration process to be completed; in the alternative, USWA requested that the Company agree to immediate arbitration over USWA's right to bargain. The Company, having previously moved the effective date of the restructuring to June 7, refused both requests stating that bargaining and arbitration were both "too time consuming." App. 37a; see also App. 33a, n. 9.

On the morning of June 7, the date the change was to go into effect, about 100 of the employees of the plant met with their union representatives, who explained the situation and put this question to the employees: "Do you want to go back into the plant, or do you want to insist that the company sit down and negotiate or arbitrate." JA 82a. The employees chose to strike. They began picketing with signs bearing the legend, "Dow unfair to its union employees, members of Local 13744 on unfair labor strike." App. 136a.

On August 9, 1971, when the strike was just over two months old, the Company by letter to USWA purported to "cancel" the collective-bargaining agreement because of an alleged breach of the contract's no-strike clause: [4]

> This is to notify you that because of the breach of the Collective Bargaining Agreement between the Allyn's Point Plant of the Dow Chemical Company and the Union which had as its effective date 2/23/70, we hereby cancel the Agreement. [App. 139a].

Three days later, August 12, 1971, the Company wrote a letter to the striking employees, stating that August 17, 1971, would be "the last day that requests for reinstatement will be accepted." App. 140a. The eleven striking employees who quit the strike after receiving that letter were not terminated. JA 408a-415a. The ninety-five who remained on strike after August 17 were terminated. App. 140a.

On that same day, fifty-five employees then working at the plant signed a typed petition to the following effect: "[W]e *do not* want or need [USWA] at our plant. . . ." [5] App. 141a. On August 28, 1971, the Company wrote a letter to USWA stating that "because of the lack of majority status and contract termination . . .

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[4] That clause provides:

> The Union will not cause or engage in or authorize its members to engage in any strike against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, unless and until all of the Bargaining and Grievance Procedures outlined in this agreement have been exhausted. The Company will not cause or sanction any lockouts unless and until all of the Bargaining and Grievance Procedures as outlined in this Agreement have been exhausted. [App. 5a].

[5] For at least a year or two prior to the strike, the average employee complement at the plant had been approximately 140. JA 256a.

the Company no longer recognizes the Union as bargaining agent for our hourly-rated employees at the Allyn's Point plant." App. 141a.

B. Proceedings Below

1. *The Board's First Decision*

On a complaint issued by the General Counsel of the National Labor Relations Board (hereinafter "NLRB" or "the Board") alleging violations of §§ 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (hereinafter referred to as "the Act"), and after a hearing, the administrative law judge issued an opinion in which he found that the Company's initial unilateral action was an unfair labor practice [6] and that the strike was in response to that unfair labor practice. Nevertheless, the judge concluded that the strike was in breach of the contractual no-strike provision, because the Company's unfair labor practice that triggered the strike was not "serious." In so concluding, the judge applied the rule adopted by the Board in *Arlan's Department Stores of Michigan, Inc.*, 133 NLRB 802 (1961), which purports to limit the holding of this Court in *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270—that a general no-strike provision in a collective-bargaining contract does not waive the employees' statutory right to engage in an unfair labor practice strike—to situations where the employer's unfair labor practice is "serious."

Having found the strike to have been in breach of contract, the judge found that the Company's unilateral cancellation of the collective-bargaining agreement, the firing of the striking employees, and withdrawal of recognition of the union were permissible responses to the strike. With respect to the validity of the unilateral

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[6] While ruling that the Company's unilateral action was a violation of the Act, the judge expressly declined to rule that it was also a violation of the collective agreement. App. 145a-146a.

cancellation of the contract, the judge relied on the rule of *Marathon Elec. Mfg. Co.*, 106 NLRB 1171 (1953), *enforced sub nom., United Elec., Radio & Machine Workers v. NLRB*, 223 F.2d 338 (CA DC 1955), *cert. denied*, 350 U.S. 981, that, based on the doctrine of material breach from general contract law, a union's strike in breach of contract justifies an employer's unilateral cancellation of the entire agreement. Given these conclusions, the administrative law judge determined that the Company's conduct should go without a remedy and that the General Counsel's complaint should be dismissed. A three-member panel of the Board, by a vote of 2-1, affirmed the judge's decision and dismissed the complaint.

2. *The Court of Appeals' First Decision*

On USWA's petition for review, the Third Circuit reversed and remanded.

At the threshold, the court upheld the determination of the Board that the chain of occurrences at issue in this case began with the commission of an unfair labor practice by the Company:

> [W]e find substantial evidence in the record viewed as a whole to support the Board's conclusion that the management-rights clause did not justify the unilateral implementation of the shift changes. Accordingly, we agree with the Board that the company violated Sections 8(a)(5) and 8(a)(1). [App. 101a].

Having so found, the court made the following rulings. First, the court concluded that if exceptions be permitted to the rule of *Mastro Plastics*, they should not be such as to permit an employer, through leverage from its own initial wrong, to achieve ends destructive of the system of collective bargaining, while eschewing peaceful means of resolving the underlying dispute. See App. 110a, 114a-117a. Accordingly, without deciding whether the *Arlan's*

rule was a proper limitation on *Mastro Plastics*, or whether the Company's initial unfair labor practice was "serious," the court held,

> that, in evaluating the company's post-strike actions, the Board should have considered as a factor the company's failure to seek peaceful resolution through the grievance procedure and in the arbitral forum. [App. 115a]

Second, the court held that, assuming the strike to have been in breach of contract, the Board had erred in finding that "the union's strike in breach of the contract justified the companys' unilateral cancellation of the entire collective bargaining agreement." App. 117a-118a. The court expressly disapproved the doctrine of *Marathon Electric*: "we believe that the strict application of the doctrine of material breach derived from contract law is inconsistent with contemporary national labor policy." App. 118a. Thus, the matter was remanded to the Board.[7]

3. *The Board's Opinion On Remand*

Whereas the case had originally been decided by only a 3-member panel of the Board, on remand the case was considered by the full 5-member Board. By a vote of 3 to 2, the Board determined to retain the *Arlan's* distinction—*i.e.*, that strikes in response to "serious" employer unfair labor practices do not violate a general contractual no-strike commitment but strikes in response to "non-serious" unfair labor practices do constitute a breach of such a commitment.[8] But upon examination of the facts of this case, the full Board, by a 4 to 1 majority, reversed the decision of the administrative law

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[7] The Company's petition for a writ of certiorari from the Third Circuit's opinion was denied. *Dow Chemical Co. v. United Steelworkers of America, et al.*, 429 U.S. 834.

[8] The other two members advocated overruling *Arlan's* and treating all unfair labor strikes, whether "serious" or "non-serious", as within the doctrine of *Mastro Plastics*. App. 32a, n. 8.

judge and the 2-member panel majority and held that the Company's "unfair labor practices were *serious* within the meaning of *Arlan's*. . . ." App. 32a-33a. In so ruling, the Board did not declare any change in the legal standard applicable to such questions but simply applied the pre-existing standard to the facts at hand.

Under *Mastro Plastics* and *Arlan's*, that finding meant that the strike was not in breach of contract and was protected conduct from its inception. Accordingly, the Board held that the Company's unilateral cancellation of the contract, termination of the unfair labor practice strikers, and withdrawal of recognition from USWA were unfair labor practices.

As an alternative ground for its decision, the Board went on to assess "the parties relative willingness to arbitrate" (App. 35a), as the Third Circuit had directed it to:

> Judged on the basis of comparative responsibility in carrying out their contractual commitments, the onus for the strike must be placed upon the [Company]. It would not have occurred but for the [Company's] adamant insistence upon implementing the unilateral shift change before the grievance procedure could be completed and before arbitration could be set in motion, if agreed to. [App. 36a].

Having for these reasons ruled that the strike was not in breach of contract, the Board found it unnecessary to reach the question whether breach of the no-strike clause by USWA would have justified the Company's unilateral cancellation of the entire contract:

> [W]e note that the Court of Appeals for the Third Circuit has here expressed disapproval of the Board's *Marathon* rule as automatically giving an employer the right to terminate the contract for strike in breach of contract. *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953). As we have found the strike here to be protected, we do not address our-

selves to the *Marathon* rule at this time. [App. 36a, n. 13].[9]

4. *The Court of Appeals' Second Decision*

This time the Company petitioned the court of appeals for review of the Board's order.[10] A new panel of the Third Circuit, including two of the members of the first panel (but not the author of the first opinion, hereinafter "*Dow I*"), by a 2-1 vote (the dissenter, Judge Weis, having been a member of the first panel) set aside the Board's order. In so ruling, the court did not purport to disturb the Board's findings that the Company's initial unfair labor practice was "serious" or that "the onus for the strike must be placed upon the [Company]." Rather, the court based its decision on the following legal principles.

First, the court ruled that even if an employer's unfair labor practice is "serious," a union's agreement to a general no-strike provision in a contract waives the employees' right to strike in response to that unfair labor practice *if* the nature of the unfair labor practice is such that "its very existence depends upon competing interpretations of a contract, either one of which would be valid." App. 16a. In this case, the Company had claimed that it had a right under the management rights clause of the contract to engage in the unilateral action that set

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[9] Member Truesdale would have reached and decided this issue as follows:

> . . . I would modify the *Marathon Electric* rule to make it unlawful for an employer to rescind the collective-bargaining agreement where it has committed *any* unfair labor practice, however minor. This modification of *Marathon* is more equitable since the employer will not benefit from his wrongdoing. It also corrects the anachronism of *Marathon*, that pure contract principles are allowed to dominate important policies of the Act. [App. 84a-85a].

[10] The court had jurisdiction over the matter pursuant to §§ 10(e) and (f) of the Act.

off the strike. The Administrative Law Judge, the Board and the Third Circuit in *Dow I* ultimately found that contractual defense to have been without merit. Nevertheless, according to the court in *Dow II*, the mere fact that the Company could assert a contractual basis for its action is sufficient to render the strike over a "serious" unfair labor practice within the ambit of USWA's contractual no-strike commitment.

Second, the court ruled, in reversal of its holding in *Dow I*, that the breach of the no-strike commitment was a "material breach . . . warrant[ing] an employer's unilateral cancellation of the entire agreement. . . . [T]he *Marathon Electric* doctrine . . . continues to fill an important need in the law of labor contracts." App. 20a-21a.

REASONS FOR GRANTING THE WRIT

The decision below is inconsistent with the principles of national labor policy stated in this Court's decisions and is in direct conflict with decisions of other circuits.

1. Contrary to the rule of *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, the court below held that a strike called solely to protest an employer unfair labor practice, which the NLRB found to be a serious statutory violation, is prohibited by a typical contractual no-strike provision that does not expressly waive the right to strike over employer unfair labor practices. The instant case is in square conflict with a decision of the Tenth Circuit, which ruled on indistinguishable facts that such a strike is *not* prohibited by such a no-strike clause. *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (CA 10 1980).

2. Contrary to the general principles stated by this Court in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, and to the application of those principles in *Drake Bakeries Inc. v. American Bakery & Confectionary Workers*, 370 U.S. 254, and *United Packinghouse Workers v.*

Needham Packing Co., 376 U.S. 247, the court below held that a union's strike in breach of contract entitles an employer to respond by cancelling the entire contract. The decision below is in square conflict with the Fifth Circuit's decision in *NLRB v. State Electric Service, Inc.*, 477 F.2d 749 (CA 5 1973), in which that court properly followed the lessons of this Court's precedents.

Resolution of each of these issues is of general importance to the conduct of labor-management relations. The apparent inconsistency of the decision below with principles established by this Court and the conflict between that decision and the decisions of other circuits leave the applicable law in disarray. Uncertainty as to the scope of the typical no strike clause and as to the right of an employer or a union to walk away from a collective agreement upon a breach by the other party will unnecessarily complicate labor-management relations, both at the bargaining table and in the day-to-day give and take that characterizes those relations. In these circumstances, whether the court below was right or wrong, it is important that this Court grant certiorari and provide definitive answers to the questions posed.

I.

The question whether a strike in opposition to an employer unfair labor practice breaches a general no strike clause in a collective agreement was addressed by this Court in *Mastro Plastics Corp.* There, the union had agreed "to refrain from engaging in any strike or work stoppage during the term of this agreement." 350 U.S. at 271. During the term of the agreement, the employees struck solely to protest an unfair labor practice committed by the employer. The Court stated the issue posed as follows:

> Whether, in the collective-bargaining contract before us, the union's undertaking "to refrain from engaging in any strike or work stoppage during the term

> of this agreement" waives not only the employees' right to strike for economic benefits but also their right to strike solely against unfair labor practices of their employers . . . . [*Id.* at 271].

See also *id.* at 277. Again, later in the opinion, the Court set out in italics the question before it (*id.* at 279):

> *Does the collective-bargaining contract waive the employees' right to strike against the unfair labor practices committed by their employers?*

The answer that this Court gave to that question was similarly without qualification as to the nature of the unfair labor practice involved:

> [W]e conclude that the contract did not waive the employees' right to strike solely against the unfair labor practices of their employers. [*Id.* at 284].[11]

The decision of the court below thus cannot be reconciled with the express holding of *Mastro Plastics*. The court below sought to rationalize its departure from *Mastro Plastics* by maintaining that where the existence of an employer unfair labor practice depends in part on an interpretation of the collective agreement the union's waiver of its right to strike should be deemed to extend to a strike over the employer's *statutory* violation. That distinction has no source in the language or ra-

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[11] The analysis by which this Court reached that decision was premised on the difference in nature between strikes "to change existing economic relationships" (*id.* at 282) and strikes over unfair labor practices. See *id.* at 279-284.

As the instant case illustrates, the Board has sought to limit the *Mastro Plastics* rule of contract interpretation to those cases where the employer's unfair labor practice is "serious." Whether the Board's rule is consistent with the holding of *Mastro Plastics* is not directly raised by the instant case, because the employer here was found to have committed a "serious" unfair labor practice. However, if certiorari is granted, the rationale by which the question here is decided may have implications as to the validity of the Board's approach.

tionale of *Mastro Plastics*. And it is founded on the very confusion of contractual and statutory rights that this Court meant to put at rest in *NLRB v. C & C Plywood*, 385 U.S. 421, 428 ("[I]n this case the Board . . . has done no more than merely enforce a statutory right. . . . The Board's interpretation [of the contract] went only so far as was necessary to determine that the union did not agree to give up [the] statutory safeguards [stated in §§ 8(a)(5) and 8(a)(1)]. Thus, the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, has not exceeded the jurisdiction laid out for it by Congress.").

In *Northeast Oklahoma City*, the Tenth Circuit confronted a strike over an employer unfair labor practice of precisely the same nature as that here and reached a result opposite to that of the court below. In that case, as here, the employer had unilaterally changed terms and conditions of employment in mid-term of a collective agreement, insisting, as did the Company in the instant case, that the agreement provided the right to do so. 631 F.2d at 675.[12] The Board had concluded, as it did here, that the contract did not give the employer the right to act unilaterally, "that the Company's mid-term changes violated Section 8(a)(5), and that this was a 'serious' unfair labor practice that justified a walkout despite the contract's general no-strike clause." 631 F.2d at 676. The Tenth Circuit enforced the Board's ruling, which was identical to that which the court below refused to enforce.

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[12] Indeed, the employer's first argument on appeal in *Northeast Oklahoma City* was that the Board should not have in the context of its unfair labor practice proceeding adjudicated the question whether the employer was authorized by the contract to act as it did, but rather should have deferred to the parties' arbitration machinery for the resolution of that contract question. 631 F.2d 673-675. The Tenth Circuit rejected that argument on the authority of *C & C Plywood Corp.*

II.

The court below expressly embraced the rule of *Marathon Electric* that an employer may cancel a collective agreement whenever a union strikes in breach of contract. In enforcing the Board's order in *Marathon Electric*, the District of Columbia Circuit explained the basis of the rule:

> It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. . . . The walkout was a material breach which justified the subsequent rescission of the contract by the company. [223 F.2d at 341].

Two years after that decision, this Court first declared that the substantive law governing collective bargaining agreements is to be fashioned by the federal courts "from the policy of our national labor laws." *Lincoln Mills*, 353 U.S. at 456. This Court ruled that other sources of law may be looked to for analogies, but only insofar as "compatible with the purpose of" national labor policy. *Id.* at 457.

Applying the principles of *Lincoln Mills*, this Court has already dealt with closely-related variants of the problem presented by the instant case. In *Drake Bakeries* and *Needham Packing Co.*, this Court ruled that a union's strike in breach of contract does not justify an employers' repudiation of his contractual commitment to arbitrate. In reaching this conclusion, the Court in *Drake Bakeries* stated:

> In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would "promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace" (S. Rep. No. 105, 80th Cong., 1st Sess. 17). . . . Under our federal labor policy, therefore, we have every reason to preserve

> the stabilizing influence of the collective bargaining contract in a situation such as this. [370 U.S. at 263-264].

The lesson of *Drake Bakeries* and *Needham Packing* was drawn by the Fifth Circuit in *NLRB v. State Electric Service, Inc.*, which is in direct conflict with the decision below. In *State Electric Service, Inc.*, "[t]he issue . . . [was] whether or not the work stoppage by the employees was sufficient to justify State Electric's termination of the contract. . . ." 477 F.2d at 750. The court held that it was not:

> [W]e think it well settled that a union's breach of a no strike clause . . . is not automatically sufficient to [terminate] the entire contract. The Supreme Court has held that a union's breach of a no strike clause does not justify an employer's subsequent refusal to arbitrate, as required by the contract, the underlying dispute which gave rise to the stoppage in the first place. See *Packing House Workers v. Needham Packing Company*, 376 U.S. 247, 84 S.Ct. 773, 11 L.Ed.2d 680 (1964); *Drake Bakeries, Inc. v. Bakery & Confectionary Workers*, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962). If a breach of a no strike clause is not enough to relieve the employer of his duty to arbitrate the issue giving rise to the illegal work stoppage, it can certainly not automatically be held that a breach of a no strike clause terminates the entire contract with the union. [*Id.* at 751-752].[13]

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[13] In *State Electric*, the Board had found the strikers protected because their strike was not in breach of the contractual no-strike clause. The court of appeals equivocated as to whether the strike was in breach of contract, *id.* at 751, 752, but enforced the Board's order because "we see other reasons why the employer cannot prevail," *id.* at 751. One of the two "other reasons" was that quoted in text.

In addition to the Fifth Circuit's decision in *State Electric*, which is in direct conflict with the ruling of the court below, the

Reaching the same conclusion as the *State Electric* opinion, leading commentators uniformly have declared the rule of *Marathon Electric* to be inconsistent with national labor policy. See Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich.L.Rev. 1, 18-19 (1958); Summers, *Collective Agreements and the Law of Contracts*, 78 Yale L.J. 525, 542-544 (1969); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif.L.Rev. 663, 797-799 and n. 522 (1973). See also, the discussion of the issue by Chief Judge Seitz in his dissenting opinion in *Children's Rehabilitation Center, Inc. v. Service Employees International Union, Local No. 225*, 503 F.2d 1077, 1080 (CA 3 1974).

---

following decisions, all of which follow and apply *Drake Bakeries* and *Needham Packing*, conflict in their reasoning with the decision below: *Trailways of New England, Inc. v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees*, 343 F.2d 815, 817 (CA 2 1965), *cert. denied*, 382 U.S. 879; *Brotherhood of Locomotive Firemen & Enginemen, Lodge 844 v. Kennecott Copper Corp.*, 338 F.2d 224, 226 (CA 10 1964); *Minnesota Joint Board, Amalgamated Clothing Workers of America v. United Garment Manufacturing Co.*, 338 F.2d 195, 199-299 (CA 8 1964).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

STATUTES INVOLVED

Section 7, of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 157, provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

Sections 8(a)(1), 8(a)(3), and 8(a)(5) of that Act provide in pertinent part as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
> >
> > * * * *
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
> >
> > * * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title.

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides as follows:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

81-153

No. ———

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THE DOW CHEMICAL COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
APPENDIX A—636 F.2d 1352 (CA 3, 1980)	1a
APPENDIX B—Order Denying Rehearing (CA 3, March 26, 1981)	27a
APPENDIX C—244 NLRB No. 129, 102 LRRM 1199 (1979)	28a
APPENDIX D—530 F.2d 266 (CA 3, 1976)	93a
APPENDIX E—212 NLRB 333 (1974)	121a
APPENDIX F—Decision of Administrative Law Judge (attached to Board's Opinion at 212 NLRB 333) (1973)	129a
APPENDIX G—Order Extending Time For Filing Petition For Certiorari (June 12, 1981)	156a

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 79-2664

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor.

Argued Sept. 15, 1980

Decided Nov. 26 1980

As Amended Dec. 17, 1980 and
Jan. 8, 1981

REHEARING AND REHEARING EN BANC

March 26, 1981

Before GIBBONS, WEIS and SLOVITER, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge.

Dow Chemical Company (Dow) petitions under section 10(f) of the National Labor Relations Act, (the Act) 29 U.S.C. § 160(f), to review an order of the National Labor Relations Board issued against it in unfair labor practice proceedings in which the United Steelworkers of America, AFL-CIO-CLC (the Union) was the charging party. The Board has cross-petitioned for enforcement of its September 17, 1979 order, which was issued following a remand

from this court.[1] That remand resulted from a petition for review filed by the Union seeking review of an earlier Board decision dismissing all its unfair labor practice charges. *United Steelworkers of America, AFL-CIO-CLC v. NLRB*, 530 F.2d 266 (3d Cir.), *cert. denied*, 429 U.S. 834, 97 S.Ct. 100, 50 L.Ed.2d 100 (1976).

In its original decision the Board had found that a strike by the Union membership on June 7, 1971, before completion of the final stage of a five-step grievance procedure, was a breach of a no-strike clause in the Collective Bargaining Agreement with Dow, and was not activity protected by section 7 of the Act, 29 U.S.C. § 157. The Board also originally held that the strike had been precipitated by unilateral action by Dow management, unauthorized by the terms of the Collective Bargaining Agreement and thus in violation of section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5). Relying on its decision in *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. No. 56 (1961), the Board concluded that the company's unilateral action was not so serious an unfair labor practice as to warrant the Union's abandonment of contract remedies and resort to a strike in breach of its no-strike agreement. Thus, it concluded, none of the subsequent company actions in response to the strike were unfair labor practices.[2] The Union, petitioning here, contended in reliance on *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956), that once the company committed an unfair labor practice the Union was justified in abandoning contract remedies and resorting to self-help. Thus, it urged, the strike was lawful protected activity, and all the company's subse-

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[1] The Board's order is reported at 244 N.L.R.B. No. 129. The Union was granted leave to intervene in this proceeding.

[2] The Board's original decision issued on June 28, 1974, is reported at 212 N.L.R.B. No. 50.

quent actions in response to it were unfair labor practices in response to that protected activity.

We "decline[d] the invitation to resolve this case by simply pigeon-holing it as within the rule of *Mastro Plastics* or of *Arlan's*." 530 F.2d at 272. Instead we remanded to the Board to consider whether, in view of the developments in the law of labor contracts remedies since the 1956 decision in *Mastro Plastics*, the Board was correct in its conclusion that each action taken by the company in response to a strike in breach of a no-strike agreement was warranted. Dow sought review by the Supreme Court, which the Board, accepting our remand, successfully opposed.[3]

On remand, the Board apparently reconsidered, holding instead, on the same record, that the company's unfair labor practice of instituting a unilateral change in working conditions was a serious unfair labor practice to which the *Mastro Plastics* rule of contract interpretation applied, so that the Union members' strike was protected activity. In thus finding that the strike was not a breach of contract, the Board eliminated the premise upon which we had acted. It never reached the question

---

[3] The Board's memorandum in opposition to Dow's petition for certiorari states:

> The court of appeals did not hold that the Company's acts in this case were necessarily unlawful. It simply remanded the case to the Board for further consideration in light of *Boys Markets* [398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199] and other recent developments, stating that the Board had given insufficient consideration to the Company's decision not to press on to arbitration. Although the Board is prepared to defend its original decision should the Court grant the petition in this case, the Board accepted the remand rather than seek review by this Court. The Board will reconsider its position, as the court of appeals has directed. Review of this case would be appropriate, if at all, only after that process has been completed. (Footnotes omitted).

whether any of the company's actions, albeit in response to a strike in breach of the no-strike clause, might have been unfair labor practices. Thus we are now presented with quite a different case than the one which was argued in September 1975. We grant Dow's petition for review and deny the Board's petition for enforcement.

I.

Facts, Charges, and Initial Decision

Dow operates a plant at Allyn's Point, Ledyard, Connecticut, where it manufactures plastics and related products. From 1954 until August 9, 1971 it recognized the Union as the bargaining representative of the production employees at the plant. Prior to May of 1971 the plant's latex department was on a seven day a week production schedule. Sixteen latex department employees worked a schedule of seven days on the job and two days off, with rotating shift assignments, while the remaining three worked a regular five day week. In mid-May Dow decided, for economic reasons related to utility costs, to put all latex department employees on a regular five day schedule, with a two day shut down. Dow believed it had the right to do so under the Management Rights clause of the Collective Bargaining Agreement effective from February 23, 1970 through February 26, 1973. That clause authorized it to determine "schedules of production." When the Union was notified of the proposed change, it took the position that the change was not a matter of management prerogatives under the contract, but a change in working conditions subject to collective bargaining. Dow's personnel manager indicated that while he was willing to discuss implementation of the change he did not consider the change itself to be a matter for negotiation. The Union thereupon filed a grievance.

The contract contains a five-step grievance procedure. It also provides that if the grievance is unresolved after

the final step it "may be submitted to any arbitrator or a board of arbitration provided the bargaining committees representing the Union and the Company each furnish written consent to utilize arbitration."[4] Grievance procedures are mandatory, while arbitration requires mutual written consent. Grievance settlements may be retroactive.[5] The contract also provides:

> 7.7 Strikes and Lock-Outs.
>
> The Union will not cause or engage in or authorize its members to engage in any strike against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, unless and until all of the Bargaining and Grievance Procedures outlined in this agreement have been exhausted. The Company will not cause or sanction any lock-outs unless and until all of the Bargaining and Grievance Procedures as outlined in this Agreement have been exhausted.

The Bargaining and Grievance Procedure in this Article has not been exhausted until all items, a, b, and c, have been carried out as set forth below:

---

[4] The arbitration clause is quoted in full in our prior opinion. 530 F.2d at 269.

[5] The contract provides:

> 7.5 Retroactivity of Settlements.
>
> The settlement of any grievance or complaint involving an undisputed error in pay shall be retroactive to the date the error occurred but not prior to the date of this agreement. Retroactivity of other grievances shall be the dates agreed to by the Grievance Committees of the Union and the Company. However, in no case shall such retroactive date be earlier than the date of the first written report to a representative of the Company or later than the date of the written report to the Superintendent of the department.

(a) The Grievance Procedure has been used and completed as set forth in Section 7.1.

(b) The Grievance Procedure has been processed through the last Step in Section 7.1 and the Union or the Company has requested in writing, within 30 days to proceed to arbitration as per Section 7.2.

(c) The Arbitration Procedure in Section 7.2 has been completed or the Union has been denied the right to the use of arbitration.

The plain meaning of this clause is that the union undertook a no-strike obligation lasting until at least thirty days after the completion of the fifth and final grievance step.

It is undisputed that the parties completed the first four steps of the grievance procedures; the Step 4 meeting took place on June 3, 1971 but failed to resolve the grievance. At that meeting a union representative orally suggested immediate arbitration, and the company responded by urging the Union to pursue the contract grievance machinery. The contract provides that if a satisfactory solution is not arrived at in Step 4 the Company shall, on written request by the Union, arrange for the unresolved case to be reviewed within ten days by the Midland Division Manager in charge of the plant. The change to five day operation was scheduled to go into effect on Monday, June 7, 1971. On Friday, June 4, there was a conversation between a representative of the Union and Dow's industrial relations manager, but no oral or written request for a Step 5 meeting was made. Indeed, no request for a Step 5 grievance meeting was made by the Union either within the ten days permitted by the contract or at any time thereafter. The day the schedule change was to be put into effect, Monday, June 7, 1971, the production workers at the plant struck.

Dow's plant manager immediately advised the Union that it considered the strike a violation of the contract,

and threatened legal action. The next day he advised the Union officials that a failure to promote and advise the return of the employees subjected the officials to disciplinary action including discharge. On June 11, he wrote to the employees, advising them that Dow considered the strike to be illegal. He continued:

> In fact, the very dispute that the strike is over is part way through the grievance procedure. I think from an employee point of view that the grievance procedure and arbitration clause that we have at Allyn's Point is a good one. It allows the use of arbitration and determination as to which of the parties is right by an arbitrator with no affiliation with the Company or Union.
>
> I sincerely feel that the resolution to the problem lies in the grievance and arbitration procedure and ask you to encourage your Union leadership to return to the legal and in my opinion morally right means of solving this problem.[6]

The letter also indicated that the strike could result in "legal remedies, disciplinary action, and even discharge."[7] When this letter was sent on June 11, 1971, a Union request for a Step 5 grievance would still have been timely. The strike continued. Dow sought in the Superior Court of Connecticut, and on June 29, 1971 obtained, a temporary injunction against unlawful picketing. On July 23, after having written two additional letters advising the employees that it considered the strike illegal, Dow advised them that it would begin hiring replacements on July 29. Meanwhile it requested the assistance of the Connecticut state mediation service, and, on July 26, 1971, advised the State Labor Commissioner

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[6] Exhibit M, 397a.

[7] *Id.*

that it was willing to submit the labor dispute resulting in the strike to arbitration or mediation. The Union was made aware of Dow's willingness to arbitrate or mediate when, on August 12, 1971, Dow amended its state court complaint to allege:

> On July 26, the Plaintiff notified the Labor Commissioner of the State of Connecticut in writing of its willingness to submit the labor dispute resulting in said strike or walkout to arbitration or mediation.

Despite notice of Dow's willingness to arbitrate even after expiration of the time limits specified in the contract, the Union continued the strike. On August 9, 1971, Dow notified the Union that because of the breach of the Collective Bargaining Agreement the contract was cancelled. Shortly thereafter the company terminated the employment of the striking employees. Dow also filed a complaint in the United States District Court, on August 20, 1971, charging the Union with breach of contract and seeking money damages. When a majority of the new or returned employees petitioned Dow, contending that they no longer wished to be represented by the local affiliated with the Union, the company, on August 28, 1971, informed the Union that its bargaining representative status would no longer be recognized.

While the strike continued, the Union filed in June of 1971 the first of a series of unfair labor practice charges, on which complaints were issued, all of which were consolidated for hearing before an administrative law judge. At that hearing the positions of the Union as the charging party and that of the General Counsel diverged. The Union's position was, and has remained, that by unilaterally announcing and implementing a change in the operating schedule, the company not only breached the collective bargaining agreement, but also committed the unfair labor practice of refusing to bargain with the

designated representative of the employees, in violation of section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158 (a)(1), (5). The Union contends that the strike was from the outset an unfair labor practice strike, which was not a violation of the contract. *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956). This being so, the Union argues, all the strike activity was legal protected activity. Thus the company's termination of striking employees, cancellation of the contract, and withdrawal of recognition were in retaliation against protected activity, and in violation of section 8(a)(1), (3), and (5) of the Act. The General Counsel, on the other hand, did not contend that the initial strike was an unfair labor practice strike falling outside the coverage of the no-strike agreement. He contended that the company's action in announcing the unilateral change was both a breach of contract and a refusal to bargain in violation of section 8(a)(5), but that the strike nevertheless violated the contract. Focusing on the company's later actions in response to the strike, the General Counsel contended that the termination of striking employees, the rescission of the contract, and the withdrawal of recognition were separate unfair labor practices which converted an economic strike in breach of the collective bargaining agreement into an unfair labor practice strike.

The Board, adopting the decision and recommended order of the Administrative Law Judge, dismissed the charges. It held:

(1) that the unilateral announcement and implementation of a work schedule change was a refusal to bargain and an unfair labor practice as to which no remedy was warranted in the circumstances of the case;

(2) that the strike was a breach of the collective bargaining agreement because the unfair labor

practice and the company's breach of contract which precipitated it was not so serious as to take it outside the covenant not to strike; and

(3) that since the strike was illegal the company's reactions to unprotected activity were not unfair labor practices.

Member Fanning dissented solely on the ground that the Board's interpretation in *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. No. 56 (1961) of the Supreme Court's *Mastro Plastics* decision was in error. He would have held that any employer unfair labor practice falls outside the coverage of a no-strike covenant. Thus no member of the Board adopted the General Counsel's position that what started out as an illegal economic strike was converted into an unfair labor practice strike by Dow's subsequent actions.

When the Union, as charging party, petitioned for review to this court it continued to espouse the theory that its strike was legal from the outset. The General Counsel, this time wearing the hat of counsel for the Board rather than of prosecutor of unfair labor practices, urged that the order dismissing the charges in their entirety be enforced. This court, acting more or less sua sponte, requested an expression of the Board's views on the question whether, assuming the strike was in fact a breach of contract, there wasn't something to be said for the General Counsel's original position that the subsequent company actions might nevertheless have independent significance as unfair labor practices. In essence we were asking whether, in the opinion of the Board, the law of labor injunctions as evolved from *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957) through *Boys Markets, Inc. v. Retail Clerks Union*, 389 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970) to *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974), did

not suggest a reconsideration of the rule of *Marathon Electric Mfg. Co.*, 106 N.L.R.B. 1171 (1953), *enforced sub nom. United Electrical Radio & Machine Workers v. NLRB*, 223 F.2d 338 (D.C.Cir. 1955), *cert. denied*, 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 850 (1956). The *Marathon Electric* rule is that the unilateral cancellation of a collective bargaining agreement following a breach of an applicable no-strike agreement, is not an employer unfair labor practice. Although we spoke of the *Mastro Plastics/Arlan's* formulation with perhaps less precision than we might have, 530 F.2d at 280, it is clear that we were proceeding on the assumption that the strike was a material breach of contract, and that our primary interest in remanding was to determine whether, assuming such a breach, *subsequent* company actions could be considered unlawful retaliations against protected activities. Had we felt that the strike was, as the Union urged, a legal one not even covered by the no-strike clause of the collective bargaining agreement, our opinion obviously would have been written quite differently, for in that event the conclusion that all the subsequent company actions complained of were illegal retaliations for protected activity would have been inescapable.

II.

Proceedings On Remand

When the Board reconsidered the case following our remand it was decided upon entirely different grounds. Chairman Fanning, with members Jenkins, Murphy, and Truesdale, held that Dow's unilateral announcement and implementation of the work schedule change was a serious unfair labor practice undermining the status of the Union, to which the no-strike clause did not apply. Thus all of the Union's activity after June 7, 1971 was considered a protected unfair labor practice strike, and all of the company's responsive actions retaliations for en-

gaging in protected activity. The Board, therefore, eight years after the events in issue, ordered reinstatement of the discharged strikers and recognition of the Union as the exclusive bargaining representative for the plant employees. Member Penello dissented, and member Truesdale wrote separately. From the separate opinions three positions emerge. Chairman Fanning and member Jenkins, relying on *Mastro Plastics*, would hold that whenever an employer committed an unfair labor practice, even one which depended, as here, on an interpretation of the contract, and even one for which there was an unexhausted contractual remedy, the no-strike clause should not apply, and strike action is lawful. Members Murphy, Penello, and Truesdale agree that *Mastro Plastics* does not require that result, and adhere to the *Arlan's* rule that only certain serious unfair labor practices, going to the very representative status of the collective bargaining representative, should be held to fall outside a no-strike cause. Member Penello would hold that the employer's conduct was not serious and in derogation of the Union's representative status, while the other four members concluded, contrary to the Board's unanimous holding in 1974, that it was. Thus the Board had no occasion to address the issue which was our chief concern in remanding—whether, assuming the strike was in breach of the contract, the company's reactions to it had independent significance as unfair labor practices. In the present posture of the case the chief issue before us is whether the Board erred in concluding that *Mastro Plastics* warrants the result which the Board reached.

III.

The Mastro Plastics Rule

There is a degree of confusion evident in the briefs, and in the several Board opinions on remand, engendered perhaps by our earlier opinion, over just what the *Mastro*

Plastics rule is. Is it a rule of contract interpretation, looking to the actual intention of the draftsmen of the no-strike clause, or a substantive rule of the law of unfair labor practices? If it is the former, the courts owe no particular deference to the Board, for by virtue of section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, they, or designated arbitral tribunals are primarily responsible for contract interpretation. If it is the latter, the Board's view is entitled to the usual regard given to the expertise of specialized administrative agencies. Had we made clear in our prior opinion our view as to what *Mastro Plastics* stands for, the Board's response to our remand would have been facilitated. We turn to that task.

Mastro Plastics was before the Supreme Court on a petition by an employer to review a Board order growing out of efforts by an employer to influence the outcome of a contested representation dispute between rival unions. A supporter of the unions with which the employer had a collective bargaining agreement was discharged for refusing to transfer his allegiance to a different union favored by the employer, and a strike ensued. The employer adamantly refused to reinstate the discharged employee and continued its unlawful support for the rival union and the strike continued for several months. The contract contained an arbitration provision to which the union could have referred the discharge grievance, but which probably did not cover the unlawful support issue. It also contained a broad no-strike undertaking.[8] When

---

[8] The contract provided:

> The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruption or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any work stoppage during the term of this agreement.

350 U.S. at 281, 76 S.Ct. at 357.

the union with which the employer had a contract filed unfair labor practices charges, including among others the discharge of 76 strikers, the company defended the discharges before the Board on two theories. It urged that the strike violated the contract, and that the strike was an unfair labor practice in violation of section 8(d)(4) of the Act.[9] The Board held that the no-strike clause was inapplicable to a strike over unlawful assistance to a rival union, and that the strike was not proscribed as an unfair labor practice by section 8(d)(4). The Supreme Court agreed unanimously with the Board's interpretation of the contract. The Court also upheld the Board's interpretation of section 8(d)(4), over three dissents. *See* 350 U.S. at 289, 76 S.Ct. at 361.

The contract issue in *Mastro Plastics* is our concern, since Dow did not urge before the Board that the strike was a section 8(d)(4) violation. That part of the Court's opinion dealing with the contract issue establishes the parameters of our decisional responsibility. The Court wrote:

> Petitioners argue that the words "any strike" leave no room for interpretation and necessarily include all strikes, even those against unlawful practices destructive of the foundation on which collective bargaining must rest. We disagree. We believe that the contract, taken as a whole, deals solely with the economic relationships between the employers and their employees. It is a typical collective-bargaining contract dealing with terms of employment and the normal operations of the plant. It is for one year and assumes the existence of a lawfully designated bargaining representative. Its strike and lockout

[9] *See* 29 U.S.C. § 158(d)(4). Section 8(d)(4) makes it an unfair labor practice to resort to a strike or lockout to affect a change in a collective bargaining contract during its term without first giving sixty days notice.

> clauses are natural adjuncts of an operating policy aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships. The main function of arbitration under the contract is to provide a mechanism for avoiding similar stoppages due to disputes over the meaning and application of the various contractual provisions.
>
> To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. Whatever may be said of the legality of such a waiver when explicitly stated, there is no adequate basis for implying its existence without a more compelling expression of it than appears in § 5 of this contract.

350 U.S. at 281-83, 76 S.Ct. at 357-58 (footnote omitted).

It is plain that the Courts' holding determined nothing more than the intention of the parties to a particular agreement. *Mastro Plastics* can be read for the proposition that, as a rule of contract interpretation, a general no-strike clause will not be read to cover strikes in resistance to unfair labor practices aimed at supplanting the bargaining representative chosen by the employees. As the Court elsewhere explained:

> [The] clause expresses concern for the continued operation of the plant and has a natural application to strikes and work stoppages *involving the subject matter of the contract.*

Id. at 281, 76 S.Ct. 357 (emphasis added).

The *Mastro Plastics* Court speculated about the legality of a waiver of the right to strike over an attempted

ouster of a chosen bargaining representative, but it did not suggest that a union could lawfully bargain away the employees' right to freely choose their bargaining representative. An agreement curtailing the employees' free choice would be illegal, and a clause deferring the question of its existence to an arbitral forum would be equally so. No arbitrator could ratify, as an interpretation of the contract, the *Mastro Plastics* employer's effort to choose the employees' bargaining representative. Thus the Court's interpretation that the no-strike clause was coterminous with what could lawfully be agreed to by contract makes perfectly good sense as a presumption of party intention.

Our case, however, because of the nature of the unfair labor practice alleged, presents a problem quite different from that with which *Mastro Plastics* dealt. A contract could lawfully relegate solely to management prerogative the disputed matter of a shift change from a seven to a five day work week, and if the Dow contract did so there would have been no section 8(a)(5) refusal to bargain. Thus we are dealing with that unique category of unfair labor practice the very existence of which depends upon competing interpretations of a contract, either one of which would be valid. We are well aware of the frequency with which disputes arise over management prerogative clauses, and thus over potential section 8(a)(5) violations for refusals to bargain. Unlike disputes concerning employer interference with employee choice of bargaining representative, such disputes can lawfully be and frequently are resolved, finally, by arbitration.[10]

In *Arlan's Department Store* the Board refined *Mastro Plastics*. The walkout in *Arlan's* was, like that in *Mastro Plastics*, precipitated by a discharge of a single employee

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[10] That same problem has spawned the Board's *Spielberg-Collyer* rule. *See NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 384 (3d Cir. 1980), (Gibbons, J., dissenting), and cases there discussed.

for engaging in protected activity, and the discharge was both grievable and arbitrable. The Board majority declined to defer to arbitration, holding that the discharge of the single employee was an unfair labor practice and ordering reinstatement.[11] But it declined to find that the consequent strike fell outside the scope of the broad no-strike agreement, and thus held that the discharge of 39 striking employees was not an unfair labor practice. Member Fanning dissented from the latter holding contending, as he has ever since that under *Mastro Plastics* no unfair labor practice strike is subject to a general no-strike agreement:

> In my opinion, the clear import of this section of the [*Mastro Plastics*] opinion is that a general no-strike clause in a collective-bargaining agreement for the term of the agreement bars only the right to strike over the "subject matter of the contract" which "deals solely with the economic relationship between the employers and their employees," a so-called "economic" strike, and does not bar a strike to protest unfair labor practices in the absence of an express waiver to that *effect because such a strike is outside the scope of the contract.*

133 N.L.R.B. at 813 (emphasis in original) (footnote omitted). This position is consistent with that taken by members Fanning and Jenkins on Board deferral to contract remedies,[12] a position having the merit of preserving the Board's authority to vindicate statutory as distinguished from contract rights. However, where the issue is not Board power to disregard a contract remedy and grant relief against unfair labor practices, but the

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[11] That sensible result may be inconsistent with *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980).

[12] *See General American Transportation Corp.*, 228 N.L.R.B. 808, 809 (1977).

intention of the parties in a no-strike clause, the case for the Fanning-Jenkins canon of construction is considerably weaker. Where the unfair labor practice depends, as in this case, entirely on how the contract is interpreted, and involves a dispute over an economic issue—overtime pay—acceptance of the Fanning-Jenkins canon of construction flies in the face of any rational intention likely to have been entertained by those who negotiated the clause. It is one thing to urge, as I have urged in the *Pincus Bros.* dissent, that contract and Board remedies coexist. It is quite another to say that a no-strike clause is presumptively inapplicable in every case in which the Board may have unfair labor practice jurisdiction.

Thus we reject the extreme application of the *Mastro Plastics* rule of construction as to the coverage of a general no-strike clause urged by Chairman Fanning and member Jenkins. We turn to the position on which the Board order rests, that in this case the *Arlan's* gloss on *Mastro Plastics* governs. As noted above, *Arlan's* involved a strike precipitated by a discharge for engaging in protected activity, the right to participate in such protected activity being a statutory right which may not be bargained away. The strike in the case before us, however, was over conflicting interpretations of a contract, either of which would be valid if agreed to. In 1971 there were two avenues open to the Union for the resolution of that dispute. It could have pursued contract grievance remedies and asked for arbitration, and it could, if it felt the employer's construction was so totally unreasonable as to amount to a refusal to bargain over a plainly bargainable issue, have filed, as it did, a section 8(a)(5) unfair labor practice charge.[13] Neither course would in any way have undermined its status as exclusive bargaining representative, for each course could result in retroactive

[13] *But see Pincus Bros., Inc.-Maxwell, supra,* note 11.

economic relief. It is simply unrealistic to suggest that the no-strike clause quoted at page 1355 *supra* was not intended to apply to a dispute over the meaning of the contract. The Board's revised order, based on a finding that the strike was not a breach of the contract, can not be sustained as an application of the rule of contract interpretation as to the coverage of a non-strike provision announced in *Mastro Plastics*. Whatever may be said about applications of that rule to strikes over unfair labor practices which are, as in *Arlan's*, independent of contract disputes, it simply does not apply here.

IV.

Other Approaches

The question remains whether aside from the *Mastro Plastics* rule of contract interpretation some substantive rule of labor law supports the Board's result. One tack would be to say that bargaining away the right to strike over any unfair labor practice results in a substantively illegal contract provision; that any unfair labor practice strike must as a matter of law remain protected activity. There are, however, insurmountable barriers to the announcement of such a rule in this case. Whatever may be said for such a rule when applied to unfair labor practices such as interference in the choice of a bargaining representative as in *Mastro Plastics*, its application to section 8(a)(5) unfair labor practices the existence of which depends upon a disputed contract interpretation would have disastrous consequences for arbitration as a preferred means for eliminating industrial strife. Obviously each resort to the courts for a *Boys Markets* injunction pending arbitration of such contract interpretations would be resisted by the contention that the employer's unreasonable construction was a refusal to bargain, an unfair labor practice, and outside the scope of the no-strike undertaking. Resolution of that contention

would involve the court in decision of the very issue for which the parties selected an arbitral forum.

Another approach would be, as we tentatively suggested in our first opinion, to overrule *Marathon Electric Mfg. Co.*, 106 N.L.R.B. 1171 (1953), *enforced sub nom. United Electrical Radio & Machine Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 850 (1956). *Marathon Electric*, as affirmed by the District of Columbia Circuit, held that a material breach of contract by a union warranted an employer's unilateral cancellation of the entire agreement. Two aspects of that approach must be considered. The first is whether the discharge of strikers was proper. The second is whether the cancellation of the contract was proper. With respect to the first aspect, prohibiting the employer from discharging the strikers raises extreme practical consequences. As we noted in our first opinion, no *Boys Markets* remedy was available to the employer here because the arbitration provision was not coextensive with the no-strike clause. 530 F.2d at 277. Dow did seek state court injunctive relief against unlawful picketing. It then resorted to the only weapon immediately available to it, operating the plant with new employees. A rule protecting illegally striking employees' employment status would effectively prevent the employer's resort to new hires. Moreover, the Supreme Court in *Mastro Plastics* expressly acknowledged that union members violating applicable no-strike clauses lost their status as employees. 350 U.S. at 280, 283, 76 S.Ct. at 356, 358. With respect to the second aspect, the termination of the contract, the same considerations intrude. Where, as here, *Boys Markets* relief is unavailable, the remaining employer option of operating the plant with permanent new hires would be seriously undermined if the employer were unable to bargain collectively with those new employees. Thus the *Marathon Electric* doctrine of

material breach of labor contracts continues to fill an important need in the law of labor contracts.

A third approach, which we had in mind at the time of our initial decision, might have made injunctive relief available to employers situated as was Dow a realistic alternative to operating a plant with new hires. We suggested that the evolution of the law under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, would be in the direction of broader availability of injunctive relief for the enforcement of no-strike clauses. The Court's decision in *Gateway Coal Co. v. UMW*, 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974), seemed to offer the promise of such an evolution. Since our initial decision, however, the Court in *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976), overruling our decisions in *NAPA Pittsburgh, Inc. v. Automatic Chauffeurs*, 502 F.2d 321 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1049, 95 S.Ct. 625, 42 L.Ed.2d 644 (1974), and *Island Creek Coal Co. v. UMW*, 507 F.2d 650 (3d Cir.), *cert. denied*, 423 U.S. 877, 96 S.Ct. 150, 46 L.Ed.2d 110 (1975), has effectively eliminated that possibility in cases such as this where the no-strike clause and the arbitration clause are not coextensive.

Finally there remains the question on which we sought, and did not receive, enlightenment from the Board; whether independent of the Union's material breach of contract some of Dow's post-strike activities were unfair labor practices. The Union urges that we should once more remand, forcing the Board to give us its views. We conclude for several reasons that another remand would be inappropriate. First, we have undertaken a careful review of the record, and we conclude that the discharge of strikers and the termination of the contract could not be found to be unfair labor practices. The strike was a material breach of contract, no *Boys Markets* injunc-

tion was available, and, unless the employer were to submit to ongoing economic coercion, new hires to operate the plant were a necessity. Permanent replacement of economic strikers and termination of the contract are corollaries to that necessity. The termination of the Union's bargaining relationship is a closer question, since it more directly relates to the non-contract issue of interference with choice of a bargaining representative. But there is evidence in the record of loss of majority status among the new hires, and our conclusion that termination of the strikers was not an unfair labor practice precludes reinstatement of the former Union adherents. Thus Union adherents were not in the majority. Perhaps most important of all, there has been the passage of nine years since the events in issue transpired. A remand solely for consideration of a bargaining order at this late stage in the history of the Allyn's Point plant would not advance the cause of free choice in the selection of a bargaining representative.

V.

CONCLUSION

Two members of this panel were members of the panel which considered the case when it was first before us. With the benefit of hindsight we offer our mea culpa to the Board for a remand in a case which on considered reflection does not seem to have been an ideal vehicle for the exploration of all the issues in the interrelationship between the law of unfair labor practices and that of contract remedies which we posed. Dow's petition for review will be granted, the Board's petition for enforcement denied, and the Board's order set aside.

WEIS, Circuit Judge, dissenting.

In our previous opinion in this case, we emphasized the importance of resolving industrial disputes peace-

fully, and pointed to the favorable climate generated by *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970), *Gateway Coal Co. v. UMW*, 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974), and this court's decisional law following that trend, *e. g., Island Creek Coal Co. v. UMW*, 507 F.2d 650 (3d Cir)., *cert. denied*, 423 U.S. 877, 96 S.Ct. 150, 46 L.Ed.2d 110 (1975); *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926*, 502 F.2d 321 (3d Cir.) (in banc), *cert. denied*, 419 U.S. 1049, 95 S.Ct. 625, 42 L.Ed.2d 644 (1974). Since that time, however, *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed. 2d 1 2 (1976), has narrowed the legal remedies available to federal courts in labor-management disputes.

Nevertheless, it seems to me that the point we made in *Dow I*, 530 F.2d 266 (3d Cir.), *cert. denied*, 429 U.S. 834, 97 S.Ct. 100, 50 L.Ed.2d 100 (1976), is still valid and represents an enlightened view on the resolution of these disputes. Our position was simply that stability in industrial relations is enhanced by the continuance of a collective bargaining agreement, and therefore, its unnecessary termination should be discouraged. Thus, we thought that even though the strike was illegal, the Board should consider whether termination of the contract was justified when the company had not exhausted the available grievance procedures or its options to proceed in court. Despite our opinion, the Board did not explore the ramifications of our suggestion and, instead, on remand decided the case on a different, and, as the majority explains, erroneous basis.

The reluctance of the Board to seriously consider our more civilized approach to settling labor-management differences is regrettable. It is disturbing that given the opportunity, the Board failed to take a stand against the unnecessary "tooth and claw" industrial warfare which we decried.

Dow I's philosophy is that both labor and management should be required to exhaust every possible peaceful method through grievance proceedings arbitration, administrative action, and court proceedings before being permitted to resort to self-help which necessarily inconveniences the public at large. Because the Board did not measure the parties' actions by that standard, I would remand once again.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2664

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor.

JUDGMENT

Before: GIBBONS, WEIS and SLOVITER, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by The Dow Chemical Company, to review an supplemental order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns on September 17, 1979, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on September 15, 1980, and has considered the briefs and transcript of record filed in this cause. On November 26, 1980, the Court handed down its opinion granting petition for review, denying the Board's application for enforcement and setting aside the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations directed against The Dow Chemical Company, its officers, agents, successors, and assigns, be and it hereby is set aside.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

BY THE COURT

/s/ John Gibbons
Circuit Judge

Costs taxed in favor of petitioner as follows:

Brief	$1,198.88
Appendix	796.88
Reply Brief ...	618.20
Clerk's fees ...	50.00
TOTAL	$2,663.96

DATED: January 26, 1981

Certified as a true copy and issued in lieu of a formal mandate on April 15, 1981.

Test: SALLY MRVOS
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2664

THE DOW CHEMICAL COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor

(Board Nos. 1-CA-7736; 1-CA-7821, and 1-CA-7873)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Intervenor in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John Gibbons
JOHN GIBBONS
Judge

Dated: March 26, 1981

APPENDIX C

244 NLRB No. 129

FJPMT
D—5149
Ledyard, CT

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 1—CA—7736 and
1—CA—7821

THE DOW CHEMICAL COMPANY

and

UNITED STEELWORKERS OF AMERICA, AFL—CIO—CLC
(formerly International Union of District 50,
Allied and Technical Workers of the
United States and Canada)

and

Case 1—CA—7873

WILLIAM J. KEITH, an Individual

SUPPLEMENTAL DECISION AND ORDER

On June 28, 1974, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] adopting the Decision of the Administrative Law Judge and finding that the Respondent had engaged in and was engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by unilaterally announcing and scheduling the change in the work schedule of the employees in its latex department from a 7-days-on-and-2-days-off workweek to a 5-days-on-and-2-days-off workweek, since such change in the work schedule of the employees was not sanctioned by the contract. However, the Board also adopted the Administrative Law

[1] 212 NLRB 333 (then-Member Fanning dissenting in part).

Judge's finding that the resulting strike to protest the Respondent's unilateral action was not in accordance with the provisions of the contract and was unprotected; the Respondent lawfully rescinded the contract since it was the United Steelworkers of America, hereinafter referred to as the Union, and not the Respondent who failed to comply with the grievance procedure of the contract; the strike was called on the day the schedule change was to take effect and followed the completion of four steps of a five-step grievance procedure, and was unprotected from its inception; the Respondent did not violate Section 8(a)(3) and (1) by terminating the striking employees; and the Respondent did not violate Section 8(a)(5) of the Act by rescinding the contract on August 9, 1971, nor did it violate the Act by withholding its recognition of the Union on August 28, 1971. The Board found that no cease-and-desist order was warranted and dismissed the complaint.

Therefore, on January 8, 1976, the Court of Appeals for the Third Circuit handed down its opinion in this case.[2] The court granted the petition to review the Order of the Board, denied the Board's cross-application for enforcement of its Order, and remanded the case— without disturbing the 8(a)(5) and (1) finding based on unilateral change of work schedule—so that the Board might reconsider its evaluation of other aspects of the case in the light of the Respondent's failure to seek peaceful resolution through the grievance procedure and the arbitral forum. The court noted that the major question in the petition for review was whether the Board should have considered the effect of *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,[3] and the fundamental developments in national labor policy since the issuance

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[2] 530 F.2d 266.

[3] 398 U.S. 235 (1970).

of "the older rules" of *Mastro Plastics Corp.* v. *N.L.R.B.*,[4] and *Arlan's Department Store of Michigan Inc.*,[5] relied upon by the Administrative Law Judge and affirmed by the Board majority in its Decision.

On May 13, 1976, the Board advised the parties that they might submit statements of position with respect to the issues raised by the remand. Subsequently, the Respondent petitioned the Supreme Court for a writ of certiorari. The Board therefore advised the parties that it would suspend the time for filing statements of position until after the Supreme Court ruled in the matter. On October 4, 1976, the Supreme Court denied the Respondent's petition.[6] On December 9, 1976, the Board again invited the parties to state their positions with respect to the issues raised by the remand of the court of appeals. Responses were filed by the Respondent and United Steelworkers of America, AFL-CIO.

The Board, having accepted the remand, respectfully recognizes the above-mentioned court opinion as a binding guide in its reconsideration, subject, of course, to later pronouncements by the Supreme Court, as in *Buffalo Forge*,[7] discussed below.

The Respondent contends that, after reconsidering this case in light of the authorities and policies discussed in the court of appeals' opinion, the Board properly can and should reaffirm its original Order dismissing the complaint in its entirety. It is the Respondent's view that only after trying by every means which appeared feasible

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[4] 350 U.S. 270 (1956).

[5] 133 NLRB 802 (1961) (then-Member Fanning dissenting in part).

[6] *Dow Chemical Company v. United Steelworkers of America, AFL-CIO-CLC*, 429 U.S. 834.

[7] *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976).

to get the Union to agree to settle the dispute through peaceful procedures did it turn to self-help measures.

The Union contends that the strike was a protected strike from its inception and, in addition, that rescission was such a "massive unfair labor practice that it surely converted the strike to protected status thereafter." Thus, it contends that the Respondent violated Section 8(a)(1), (3), and (5) by rescinding the collective-bargaining agreement, discharging the striking employees, and withdrawing recognition from the Union. We find merit in the Union's contention.

The court of appeals remanded the case "guided . . . by jurisprudential guideposts in recent Supreme Court pronouncements" favoring resolution of labor disputes by arbitration, as discussed later in this Decision. The court was also guided, in questioning the Board's dismissal, by considerations of prudence based on its doubt that the Board's resort to the "*Mastro Plastics/Arlan's* formula" furthered the cause of industrial peace. It viewed that formula as setting up an unworkable distinction between serious and nonserious employer unfair labor practices, providing a union no helpful criteria on whether an unfair labor practice strike would be protected or unprotected in cases where the union had made a general no-strike commitment.

In charting the remand, the court further observed that under the decision it was issuing the union would still be on the horns of a dilemma, but the company faced with a strike "will know that it should take precautions" before resorting to such self-help as cancellation of contract, termination of striking employees, and refusal to recognize by withdrawing recognition from the Union.

With respect to the "*Mastro Plastics/Arlan's* formula" and its impact on industrial peace, the Board has now seriously considered the possibility that overruling *Ar-*

lan's because of its distinction between serious and non-serious unfair labor practices would create a desirable degree of stability in the law with respect to a union's resort to strike action in the face of a no-strike clause. The contract here, section 7.7, prohibits strikes and lockouts unless and until all of the bargaining and grievance procedures outlined in it have been exhausted. But *Arlan's* holds that a no-strike commitment cannot be avoided by a union if the unfair labor practice indulged in by the employer is "non-serious." After much reflection a majority of this Board—Members Penello, Murphy, and Truesdale—deem it wise to retain this distinction in Board law as a deterrent to possible hasty strike action.[8] However, on the facts now before the Board,

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[8] Chairman Fanning and Member Jenkins would overrule *Arlan's* consistent with the suggestion of the court of appeals here. In *Arlan's*, then-Member Fanning dissented. He considered the unfair labor practices that occurred there serious. The majority of two in that 1961 case (two members did not participate) found the discharge of a union steward, stemming "largely" (but not totally) from a clash or personalities between the steward and the plant manager, as "not serious" in the sense of being destructive of the foundation upon which bargaining must rest. As a result, the walkout by 39 employees in protest was found to have violated the no-strike clause requiring the grievance to be processed under the grievance and arbitration provisions of the contract. In his *Arlan's* dissent, then-Member Fanning reasoned that the Supreme Court in *Mastro Plastics, supra,* had emphasized the scope and coverage of the contract containing the no-strike clause rather than the degree and kind of unfair labor practice that precipitated the strike.

Member Jenkins agrees with the latter interpretation and would therefore, like Chairman Fanning, overrule *Arlan's* and its troublesome "gloss" with respect to *Mastro-Plastics.* Thus they would return to the basic holding of the Supreme Court in that case that a contractual waiver of the right to strike does not preclude an unfair labor practice strike unless the contract *specifically* waives the right to strike because of unfair labor practices. Allowing *Mastro Plastics* to exert its full impact would in their view tend to foster labor peace by discouraging employers to take unilateral action, as here, that the Board may construe as "non-serious."

a four-member majority—excepting Member Penello—conclude that Respondent's unfair labor practices were *serious* within the meaning of *Arlan's*, including Respondent's insistence upon instituting the shift change unilaterally before the ongoing grievance procedure—resorted to by the Union when Respondent declined to bargain over the change—could be completed. That insistence precipitated the strike, and was a serious unfair labor practice in violation of Respondent's duty to bargain with the employees' recognized representative concerning a condition of employment. In these circumstances the Union was not obliged to complete step five of the grievance procedure or make a *written* request for arbitration.[9]

We turn now to those fundamental developments in national labor policy that, according to the court of appeals, "should have commanded the Board's attention." These are: (1) the 1957 decision of the Supreme Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, holding that Section 301 of the Labor-Management Relations Act gives Federal district courts power to decree specific performance of "collectively bargained" agreements to arbitrate; that an agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike, and that the legislation in question is not merely jurisdictional, but expresses a Federal policy that Federal courts enforce these agreements on behalf of or against labor organi-

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[9] Two *oral* requests for arbitration made by the Union several days earlier were flatly denied, as Respondent's transcribed minutes of step four of the grievance procedure disclose. (C.P. Exh. 5, p. 43.) In fact, at the fourth step Respondent pointedly stated that, *both bargaining* concerning the proposed shift change—to which Respondent was specifically obligated by the contract (art. VI, sec. 6.2 Negotiations)—*and arbitration*—for which Respondent's consent was required—were "too time consuming."

zations, and that industrial peace can be best obtained only in that way; (2) the Court's 1960 decisions in the *Steelworkers* trilogy [10] announcing the presumptive arbitrability of labor disputes; and (3) the Court's 1970 decision in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, sanctioning, pursuant to Section 301, injunction proceedings with respect to a strike in circumstances where the contract provided that all controversies over its application were to be resolved by arbitration and that no work stoppage, lockout, picketing, or boycotts were to occur during the contract term.

As to the applicability of *Boys Markets* here, we note that the court of appeals itself concluded that such an injunction was not in fact available to this Respondent in light of the *nonmandatory* arbitration clause provided in the Dow contract. And, as we read *Lincoln Mills* and the *Steelworkers* trilogy, the nonmandatory arbitration clause also militates against Federal court action pursuant to those cases.[11]

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[10] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593.

[11] The Chairman and Member Jenkins note that not only did the Supreme Court include a warning in its *Boys Markets* decision that the holding was a narrow one not intended to undermine the anti-injunction provisions of the Norris-LaGuardia Act, but the Court has since issued its decision in *Buffalo Forge Co., supra.* There the strike was a sympathy strike for a sister local and the employer sought both an order directing the union to arbitrate and also a *Boys Markets* injunction of the strike pending arbitration. The Court said:

> Section 301 of the Act assigns a major role to the courts in enforcing collective-bargaining agreements, but aside from the enforcement of the arbitration provisions of such contracts, *within the limits permitted by Boys Markets*, the Court had never indicated that the courts may enjoin actual or threatened

There remains for our consideration on this remand a reassessment of the parties' relative willingness to arbitrate, a matter of great concern to the court.[12] The

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contract violations despite the Norris-LaGuardia Act. [Emphasis supplied; 428 U.S. at 409.]

The Court found that the dispute in *Buffalo Forge* was not subject to the contract's no-strike clause and declined to accommodate the policies of Norris-LaGuardia to Section 301 of the Act as it had in *Boys Markets*. The Chairman and Member Jenkins note particularly the Court's pronouncement that it was "far from concluding that the arbitration process will be frustrated unless the courts have the power to issue interlocutory injunctions pending arbitration in cases such as this, or in others in which an arbitrable dispute awaits decision." Heeding this opinion, it would seem unwise to rely upon the failure of an employer to attempt to enjoin a strike such as occurred at Dow. In addition, from the larger view, it appears that *Buffalo Forge* confirms reliance upon *Mastro Plastics* as a basic solution of the problem whether the Union's strike in protest of Dow's unfair labor practices was protected. We would find that it was. The Court there noted that failure of the Board to sustain the right to strike against unfair labor practices would seriously undermine the primary objectives of the Act. Though the language of the *Mastro Plastics* contract was broad, it was not specific as to unfair labor practice strikes and constituted no waiver of the right to strike solely against unfair labor practices.

[12] The dissent in the underlying Board case had concluded that "responsibility for the strike rests more upon Respondent as perpetrator of the unfair labor practice than upon the Union and the employees who sought to utilize peaceful means of securing their statutory rights and only desisted therein when brought face to face with a *fait accompli*." Citing *Mastro Plastics*, then-Member Fanning said: "'Good judgment' demands that before a no-strike clause he construed as applying to strikes protesting unfair labor practices there be clear and unmistakable language in the contract to that effect." The dissent then went on to say: "It demands as well consideration of the fact that the Union and the employees withheld strike action and continued to utilize the grievance provisions of the contract in an attempt to force the Respondent to the bargaining table up to the time that Respondent decided to implement the announced change." (212 NLRB at 334.)

facts reveal that the Respondent's proposed changes in the work schedule entailed considerable loss of remuneration to 16 or 19 employees whose shift was to be changed, a loss that employees could only view as a grave violation of the bargaining obligations required of the Respondent, and one that undermined the status and authority of the Union. Judged on the basis of comparative responsibility in carrying out their contractual commitments, the onus for the strike must be placed upon the Respondent. It would not have occurred but for the Respondent's adamant insistence upon implementing the unilateral shift change before the grievance procedure could be completed and before arbitration could be set in motion, if agreed to.

Inasmuch as we have found that the strike was an unfair labor practice strike from its inception on June 7, 1971, in response to Respondent's unilateral action that precipitated it, it follows that the August 9, 1971, rescission of the contract by the Respondent was a violation of Section 8(a)(5) and (1),[13] that the termination of the unfair labor practice strikers on August 17, 1971, was a violation of Section 8(a)(3) and (1),[14] and that

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[13] See *N.L.R.B. v. State Electric Service, Inc.*, 477 F.2d 749 (5th Cir. 1973), cert. denied 414 U.S. 911, to the effect that, "assuming" the Union's breach of a no-strike clause, such breach is not ordinarily sufficient to breach the entire contract, and noting that the employer there chose not to avail itself of the contract's broad arbitration clause.

Concerning the "right" to breach an entire contract, we note that the Court of Appeals for the Third Circuit has here expressed disapproval of the Board's *Marathon* rule as automatically giving an employer the right to terminate the contract for strike in breach of contract. *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953). As we have found the strike here to be protected, we do not address ourselves to the *Marathon* rule at this time.

[14] See *Kellstone, Inc.*, 206 NLRB 156 (1973), enfd. 493 F.2d 1352 (6th Cir. 1974), where the Board found an 8(a)(5) rescission of contract and 8(a)(3) discharge of striking employees allegedly

the withdrawal of recognition on August 28, 1971, was also a violation of Section 8(a)(5) and (1).

In response to Member Penello's separate opinion, concurring in part and dissenting in part, we comment as follows: An early tactical mistake in this controversy was the Respondent's interpretation of its own collective-bargaining agreement as not requiring it to bargain on the proposed shift change as a condition of employment. It focus instead on the management-rights clause, ignoring its agreement (contract, sec. 6.2) to negotiate terms and conditions of employment, and also ignoring the language specifically linking the bargaining and grievance procedures in section 7.7 of the contract, providing that both bargaining and grievance procedures must be exhausted before a strike or lockout is permissible. The Respondent took the initiative by refusing to negotiate, thus violating Section 8(a)(5) as the Administrative Law Judge found. This forced the Union to resort to the grievance procedure, the only alternative short of self-help. At step four of the five-step grievance procedure, the Respondent refused to accelerate the pace by consenting to arbitration in response to the Union's oral requests. As footnote 9 above points out, the Respondent freely admitted its reasons: bargaining and arbitration were both "too time consuming" for it. In fact it then suggested that the Union after completing the grievance procedure could sue for recovery to determine whether the Respondent made the wrong choice in implementing its unilateral change. Clearly the Respondent was intent

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for violating a contract the employer declared no longer existed. The citation of *Kellstone* by the Administrative Law Judge as affirming the rule in *Marathon* (referred to in the preceding footnote) is an overstatement; the Board's reference there to *Marathon* was limited to the general or hornbook law proposition that ". . . 'as a general rule of law, one party to a contract need not perform if the other party refuses *in a material respect* to do so.'" (Emphasis supplied; 206 NLRB at 157.)

upon the shift change being made on a date certain, *before* the formalities of the grievance procedure could be completed. Thus, the ensuing strike rather than being in violation of the contract was protected.

Member Truesdale in his separate concurrence would find the Respondent less willing than the Union to take affirmative steps to obtain binding arbitration of the dispute, a conclusion with which we agree wholeheartedly. We are, however, puzzled by his attaching no significance to the "bargaining and grievance procedure" language of the contract. Though the court of appeals appeared to rule that out in part III of its opinion—which speaks of the Union not having exhausted the grievance procedure, thus the strike was not one authorized by the contract—later in part VII what the court remanded for reconsideration was "all" except the Board's 8(a)(5) finding that the Respondent refused to bargain over the shift change. We are therefore inclined to the view that there is no procedural impediment at this time to emphasizing the specific terms of the governing contract.

Conclusions of Law

1. The Dow Chemical Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC (formerly International Union of District 50, Allied and Technical Workers of the United States and Canada), is a labor organization within the meaning of Section 2(5) of the Act.

3. All hourly rated employees of the Respondent employed at its Allyn's Point plant, exclusive of plant protection employees, office and clerical employees, salaried employees, engineers and professional employees, superintendents, foremen, subforemen, and all supervisors as

defined in Section 2(11) of the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times relevant herein and continuing to date, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally announcing and scheduling the change from a 7-consecutive-days-on-and-2-days-off workweek to a 5-consecutive-days-on-and-2-days-off workweek for the employees in its latex department, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing on or about May 20, 1971, and at all times thereafter, to bargain collectively concerning this change with the above-named labor organization as the exclusive bargaining representative of all the employees of the Respondent in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By unilaterally canceling the collective-bargaining agreement which was effective from February 23, 1970, to February 26, 1973, by letter of August 9, 1971, without first notifying or bargaining with the Union concerning said cancellation, and without first obtaining agreement with the Union concerning said cancellation, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. By withdrawing recognition of the Union on or about August 2, 1971, and thereafter refusing to recognize the Union as the exclusive bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

9. The Respondent has violated Section 8(a)(1) and (3) of the Act by discharging or refusing to reinstate on August 18, 1971, the employees who engaged in a strike commencing on June 7, 1971, as listed on Appendix A.

10. By the aforesaid unlawful unilateral announcement and scheduling of the work shift change, failing and refusing to bargain, unilateral cancellation of the collective-bargaining agreement, withdrawal of recognition of the Union, and the discharge and failure to reinstate those employees who engaged in a protected strike, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

11. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative action, including reinstating and making whole all those employees who engaged in the protected strike commencing June 7, 1971, and who were terminated on August 18, 1971. Reinstatement of the employees shall be to the same jobs or, if those no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges.

We shall also require the Respondent to pay each terminated striker backpay for losses suffered as a conse-

quence of the Respondent's unlawful termination of the striking employees on August 18, 1971. An employee's backpay period shall begin with his termination and shall terminate with the offer of reinstatement. Loss of pay and interest thereon are to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[15]

Having found that the Respondent is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a written signed agreement.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Dow Chemical Company, Ledyard, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging and failing to reinstate any of its employees because of their participation in protected strike activities.

(b) Refusing to bargain with United Steelworkers of America, AFL-CIO-CLC (formerly International Union of District 50, Allied and Technical Workers of the United States and Canada), as the exclusive representative of the employees in the appropriate bargaining unit by unilaterally announcing and scheduling the change

[15] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

from a 7-consecutive-days-on-and-2-days-off workweek to 5-consecutive-days-on-and-2-days-off workweek for certain employees in the latex department.

(c) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with the aforesaid Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All hourly rated employees of the Respondent employed at its Allyn's Point plant, exclusive of plant protection employees, office and clerical employees, salaried employees, engineers and professional employees, superintendents, foremen and subforemen, and all supervisors as defined in Section 2(11) of the Act.

(d) Refusing to bargain collectively with the aforesaid Union by unilaterally canceling the collective-bargaining agreement, which was effective from February 23, 1970, to February 26, 1973, without first notifying or bargaining with the Union concerning said cancellation.

(e) Refusing to recognize and bargain collectively with the aforesaid Union as the exclusive bargaining representative of its employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment, by withdrawing recognition from such Union as the exclusive representative of its employees in the appropriate unit.

(f) Discharging and refusing and failing to reinstate its employees to their former or substantially equivalent positions because they participated in a protected strike and refused to work during such strike.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Recognize United Steelworkers of America, AFL-CIO-CLC (formerly International Union of District 50, Allied and Technical Workers of the United States and Canada), as the exclusive bargaining representative of its employees at the Allyn's Point plant.

(b) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of employment, changes in work schedules, including consecutive work-days to be required each week, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a written signed agreement.

(c) Offer the employees named in Appendix A immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay suffered by reason of the Respondents' discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary or useful in determinnig compliance with this Order, and the computation of the amount of backpay.

(e) Post at its plant at Allyn's Point, Ledyard, Connecticut, copies of the attached notice marked "Appen-

dix B." [16] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. September 17, 1979

JOHN H. FANNING, Chairman

HOWARD JENKINS, JR., Member

BETTY SOUTHARD MURPHY, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

MEMBER PENELLO, concurring in part and dissenting in part:

I am pleased to join two of my colleagues (Members Murphy and Truesdale) in reaffirming the well established *Arlan's* rule [17] that a strike in violation of a no-strike clause of a collective-bargaining agreement is a breach of contract and, absent "serious" unfair labor practices by the employer, is unprotected. In the 18 years that *Arlan's* has been the accepted interpretation of *Mastro Plastics*,[18] it has proven to be a sensible and effective rule which discourages a union from seizing upon a trivial or "nonserious" unfair labor practice to strike in violation of an agreed-upon no-strike clause. The demise of *Arlan's*, which is advocated by my other two colleagues (Chairman Fanning and Member Jenkins), would create uncertainty in the administration of collective-bargaining agreements, encourage spontaneous wildcat strikes, and ultimately undermine the foundations upon which the collective-bargaining process rests.

However, with regard to the application of the *Arlan's* rule to the facts of this case, I cannot agree with the conclusion reached by all of my colleagues that the Company's unfair labor practice was "serious" within the meaning of *Arlan's*. In light of this disagreement, and in order to explicate fully my position on the critical legal and factual issues presented in this case, I have decided to file this separate opinion.

I.

The basic facts of this case can be summarized as follows. In May 1971,[19] the Company unilaterally an-

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[17] *Arlan's Department Store of Michigan Inc.*, 133 NLRB 802 (1961) (then-Member Fanning dissenting in part).

[18] *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956).

[19] All dates unless otherwise indicated are 1971.

nounced and scheduled a work change in its latex department. The Union Local president demanded that the Company bargain over the proposed change prior to its implementation. The plant personnel manager responded that he was willing to discuss the change but that there was no duty to bargain concerning such a change. Thereupon, the Union invoked the grievance procedure provided in the collective-bargaining agreement.

The collective-bargaining agreement contained a limited no-strike no-lockout provision which barred a strike unless and until: (1) all five steps of the grievance procedure had been exhausted; (2) the Union had made a written request for arbitration within 30 days after the receipt of the step-five answer; and (3) arbitration had either been completed or refused.

On June 7, the day the schedule change was to be implemented, the Union went on strike. The Union failed to exhaust the contractual prerequisites for such a strike in that it never invoked step five of the grievance procedure and did not file a written request for arbitration. In an attempt to end the strike, the Company wrote to the employees and the union committee members stating "that the resolution of the problem lies in the grievance and arbitration procedure," solicited help from state mediation officials, and informed employees that it would begin hiring replacements on July 29. Finally, after sustaining the strike for 2 months, the Company, by letter dated August 9, notified the Union that because of the Union's breach of the collective-bargaining agreement it was rescinding the contract. None of these company counter-measures resulted in a cessation of the strike. Thereupon, on August 17, the Company terminated the striking employees. Subsequently, a majority of the employees then employed signed a petition stating that they no longer wished to be represented by the Union. Relying on this petition, the Company withdrew recognition from the Union.

On these facts, the Board, adopting the Decision of the Administrative Law Judge, found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally announcing and scheduling a change in the work schedule of the latex employees.[20] The Board further found that the strike was in breach of the no-strike provision of the contract because the Union did not comply with the contractual prerequisites to a strike. Thus, the Union "failed to submit the dispute in accordance with" the contract's grievance-arbitration procedure which "was available for the peaceful resolution of the dispute."

The Board therefore applied the rule of *Mastro Plastics*[21] as subsequently interpreted by the Board in *Arlan's* that "only strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses."[22] It concluded that the Company's unilateral conduct "was not of such serious nature as to be destructive of the foundation on which collective bargaining must rest."[23] Accordingly, the Union's breach of the no-strike provision of the contract rendered the strike "unprotected from its inception."[24]

Finally, the Company's self-help measures in response to this unprotected strike were not found to be violative of the Act. The Company's rescission of the contract was permissible in light of the Union's material breach of the contract; the termination of the striking employees was proper since the strike had resulted in a forfeiture of

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[20] 212 NLRB 333 (1974) (then-Member Fanning dissenting in part).

[21] 350 U.S. 270 (1956).

[22] 133 NLRB at 807.

[23] 212 NLRB at 340.

[24] *Id.*

the employees' reinstatement rights; and the Company was entitled to withdraw recognition from the Union based upon the petition signed by a majority of the employees then employed.

The Third Circuit granted the Union's petition for review and remanded the case to the Board for reconsideration in light of the court's opinion.[25] The court upheld the Board's finding that the Company initially committed an unfair labor practice by unilaterally announcing and scheduling a work change. It further accepted the Board's finding that the strike was not authorized by the contract because the Union failed to exhaust the grievance procedure and did not file a written request for arbitration. However, the court remanded the case to the Board to consider the effect of *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), and other recent developments on the permissibility of the Company's post-strike actions.[26]

In denying enforcement, the court objected to the *Arlan's* doctrine on the grounds that it was not in keeping with "jurisprudential guideposts . . . on national labor policy" which favors arbitration over the automatic right to resort to the "tooth and claw" of industrial warfare. The court also expressed concern that, under the *Arlan's* interpretation of *Mastro Plastics*, the principals to a labor dispute cannot know for certain what is or is not a "serious" unfair labor practice. The court, in accommodating *Arlan's* with recent developments in labor law, concluded that a corollary principle was necessary; i.e., nonserious unfair labor practice strikes in violation of a general no-strike clause are unprotected, but employers are obligated to exhaust the legal and contracted rem-

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[25] 530 F.2d 266 (1976).

[26] *Id.* at 278.

edies available before resorting to such self-help measures as discharge or rescission of the contract.[27]

By contrast, Chairman Fanning and Member Jenkins claim that *Arlan's* was an incorrect interpretation of *Mastro Plastics*. They state that the Supreme Court in *Mastro Plastics* emphasized the scope and coverage of the contract containing the no-strike clause rather than the degree and kind of unfair labor practice that may precipitate the strike. According to Chairman Fanning and Member Jenkins, their view of *Mastro Plastics* furthers labor peace and accords predictability to the parties who are put on notice that a general no-strike clause does not forbid a strike prompted by the unfair labor practices of the employer.

In short, *Arlan's* is attacked on two fronts. Chairman Fanning and Member Jenkins insist that *Arlan's* unduly restricted the scope of *Mastro Plastics* which comprehended that any unfair labor practice strike would be immune from a general no-strike clause. By contrast, the court is disturbed that *Arlan's*, standing alone, does not restrict the utilization of self-help by employers on the occasion of a breach-of-contract strike. The court contended that recent labor law developments necessitate a modification of the *Arlan's* rule. With all respect, I disagree that the *Arlan's* rule merits rejection or modification. I remain convinced that *Arlan's* is a correct application of the reasoning underlying *Mastro Plastics* and that it is entirely consistent with contemporary labor policy.

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[27] The court stated that its proposed modification of *Arlan's* will still place "a union . . . on the horns of a dilemma when it believes the employer has committed an unfair labor practice." The union must ascertain whether the unfair labor practice is a "serious" or "major" one in order to engage in a protected strike. Thus, the court stated that its approach will encourage use of the arbitral forum "while safeguarding the union's interests in protecting its organizational integrity from *major* employer unfair labor practices . . . ." (Emphasis supplied; 530 F.2d at 279.)

In order to explain my conclusion adequately, part II of this opinion reviews the rationale of *Mastro Plastics* and *Arlan's* along with the consequences that an overruling of *Arlan's* would engender. Recent developments in labor law are discussed in part IIIA in considering whether a modification of *Arlan's* is mandated. Finally, in part IIIB, the facts of this case are reviewed in order to highlight my disagreement with the factual analysis of the majority and the court.

II.

In *Mastro Plastics*, the Supreme Court held that, absent explicit contractual language to the contrary, a general no-strike clause does not waive the employees' right to strike in response to flagrant unfair labor practices committed by the employer. *Mastro Plastics* involved a group of employers engaged in a "willful, deliberate, widespread, and grave" campaign designed to coerce the employees to abandon their collective-bargaining representative and to substitute another union which the employers preferred. The Supreme Court characterized this campaign as a "flagrant example of interference by the employers with the expressly protected right of their employees to select their own bargaining representative." [28] Despite the existence of a general no-strike provision in the contract, the employees struck in response to these numerous unfair labor practices which included the discharge of a leading adherent of the incumbent union.

The employers defended the subsequent termination of these strikers on the grounds that the strike was unprotected in that the words "any strike" in the general no-strike clause prohibited all strikes, even those in response to unfair labor practices "destructive of the

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[28] 350 U.S. at 278.

foundation on which collective bargaining must rest." [29] The Court rejected this defense as contrary to the primary objectives of the Act since it would:

> . . . eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union.[30]

The Court in *Mastro Plastics* recognized that no-strike pledges are based on the premise that the parties will respect the basic integrity of the union and the collective-bargaining framework during the term of the contract. Such no-strike clauses promote the statutory policies of labor peace "[*p*]*rovided the selection of the bargaining representative remains free.*" [31] Thus, if the employer's unfair labor practices are indicative of a determination to seriously undermine or disrupt the integrity of the union, a general no-strike pledge will not shield the employer from a resulting strike which would be protected activity from its inception.

In *Arlan's Dept. Store of Michigan Inc., supra*, the Board eschewed a broad interpretation of *Mastro Plastics*. The Board reasoned that the language used by the Court and its rationale could not be divorced from the facts of the case and the argument presented by the parties. Accordingly, the Board held that a strike in derogation of a general no-strike pledge was unprotected when the underlying unfair labor practice, a discharge, was isolated and in large part was the result of a "clash of personalities." [32] The Board concluded that the dis-

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[29] *Id.* at 281.

[30] *Id.* at 283.

[31] *Id.* at 280.

[32] 133 NLRB at 808.

charge "was not serious in the sense in which we have used the term, i.e., it was not in the words of the Supreme Court 'destructive of the foundation on which collective bargaining must rest.' " [33]

The *Arlan's* approach is a sound one based on a rule of reason. When an employer commits a minor unfair labor practice, a strike in response is laregly unnecessary because the integrity of the union and the collective-bargaining relationship remains intact. A statutory remedy is always available and redress is also available through the grievance-arbitration provisions of the contract. The Board in *Arlan's* emphasized that:

> A contract grievance procedure with accompanying no-strike, no-lockout clauses, constitutes the contracting parties self-created judicial machinery for resolving the inevitable frictional disputes arising from the day-to-day administration of labor relations. It represents a civilized substitution for force in the settlement of such disputes beneficial to all parties involved in such disputes. We believe that resort to such machinery for the settlement of labor controversies should be encouraged by a public agency. We can perceive no public policy served by a holding that the kind of dispute involved in this case is exempt from the coverage of the contract grievance procedure and may properly be resolved by a test of economic strength.[34]

The Board's interpretation of *Mastro Plastics* has been confirmed in subsequent Supreme Court decisions where the Court has stated its holding in terms of the seriousness of the unfair labor practices. Thus, in *Drake, Bakeries Incorporated v. Local 50, American Bakery &*

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[33] *Id.* (quoting from *Mastro Plastics, supra*).

[34] *Id.*

Confectionery Workers International, AFL-CIO,[35] the Court, in explaining *Mastro Plastics*, emphasized that it "involved a flagrant unfair labor practice by the company threatening the very existence of the union itself" and that "the parties could not have intended to waive the employees' right to strike over a flagrant unfair labor practice." [36] More recently, in *N.L.R.B. v. Magnavox Company of Tennessee*,[37] the Court characterized its *Mastro Plastics* holding in virtually the same language used in *Arlan's*. The Court stated that "we held [in *Mastro Plastics*] that the waiver of the 'right to strike' did not embrace a waiver of the right to strike 'against unlawful practices destructive of the foundation on which collective bargaining must rest.' " [38]

Chairman Fanning and Member Jenkins have embraced an interpretation of *Mastro Plastics* which they contend will be beneficial by providing greater certainty and predictability to the parties. However, the benefits flow-

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[35] 370 U.S. 254 (1962).

[36] *Id.* at 265.

[37] 415 U.S. 322 (1974).

[38] *Id.* at 325. The *Arlan's* interpertation of *Mastro Plastics* has been approved in the following cases: *Dow Chemical Co. v. International Union of Electrical, Radio & Machine Workers, AFL-CIO*, 82 LRRM 3169, 3818 (D.C. Fla. 1971), affd. 480 F.2d 433 (5th Cir. 1973), cert. denied 415 U.S. 932 (1974); *Pence Construction Corporation v. Hoisting and Portable Engineers Local 450 of the International Union of Operating Engineers, AFL-CIO*, 484 F.2d 398, 401 (5th Cir. 1973), cert. denied 414 U.S. 1144 (1974); *Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America [Kohler Company] v. N.L.R.B.*, 300 F.2d 699, 704, fn. 19 (D.C. Cir. 1962), cert. denied, 370 U.S. 911. See also *Local Union No. 1055, International Brotherhood of Electrical Workers, AFL-CIO, et al. v. Gulf Power Company*, 182 F.Supp. 950 (D.C. Fla. 1960), which predated *Arlan's*, but also discussed *Mastro Plastics* in terms of the seriousness of the employer's unfair labor practice.

ing from this unnecessarily broad interpretation of *Mastro Plastics* are illusory and certainly would not be worth the inevitable disruptive consequences it would engender. As noted by Justice Cardozo, "[T]here is a certainty that is genuine and a certainty that is illusory, a symmetry that is worth attaining and a symmetry to be shunned . . . . Overemphasis of certainty may carry us to the worship of an intolerable rigidity."[39] Experience has shown that bright-line tests are rarely practical when applied to labor relations. As *Arlan's* recognized,

> In this field, lines between the licit and illicit can rarely be drawn clearly in advance. And in the penumbral areas which are omnipresent, there is no substitute for niceties of judgment. As the Supreme Court recently observed in *Local 761, International Union of Electrical, Radio, and Machine Workers, AFL-CIO v. N.L.R.B. and General Electric Company*, 366 U.S. 667, 674, "However difficult the drawing of lines more nice than obvious, the statute compels the task."[40]

In *Arlan's*, the Board relied on its "experience, good sense, and good judgment," in determining whether an unfair labor practice involves conduct "destructive of the foundation on which collective bargaining must rest." The delineation between serious and nonserious unfair labor practices is no more difficult than other tests used by the Board. In practice, the *Arlan's* doctrine has been a commonsensical one which has resulted in a considerable degree of certainty. Thus, the Board has characterized as serious unfair labor practices those which threaten the very existence of the union, such as massive dis-

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[39] Benjamin Cardozo, "The Growth of the Law," New Haven, Yale University Press at 19 (1927).

[40] 133 NLRB at 807.

charges;[41] complete repudiation of the bargaining obligation;[42] unlawful assistance and support to a rival union;[43] or a company campaign intended to fire unionists "one-by-one."[44] The Board has defined nonserious unfair labor practices as an isolated discriminatory discharge[45] or unilateral acts[46] which do not justify breach of a no-strike clause. The key inquiry in every case is whether the company's conduct is indicative of an intent to devastate the integrity of the union or a wholesale negation of its contractual obligations. Under such circumstances, a union will not be held bound by a no-strike clause which was predicated on the employer's respect for the employees' essential rights of self-organization.

The demise of *Arlan's* would exert a disruptive influence on the administration of collective-bargaining agreements. The view that a general no-strike clause is suspended whenever the employer commits any unfair labor practice is contrary to the plain and inherently sensible meaning of no-strike language. As Professor Cox has noted:

> Management is not infrequently charged with taking unilateral action in violation of a contract and presumably the unilateral action is also an

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[41] *Paul Biazevich, Dinko Biazevich, Jerry Kuser d/b/a MV Liberator, et al.*, 136 N.L.R.B. 13, 19-21 (1962), enfd. 374 F.2d 974 (9th Cir. 1967), cert. denied, 389 U.S. 913.

[42] *Kellstone, Inc.*, 206 NLRB 156 (1973), enfd. 493 F.2d 1352 (6th Cir. 1974).

[43] *Mastro Plastics, supra.*

[44] *The Cincinnati Penthouse Club, Inc.*, 168 NLRB 969 (1967).

[45] *Arlan's Department Store of Michigan, Inc., supra; Poloron Products of Indiana, Inc.*, 177 NLRB 435, 438-439 (1969).

[46] *Atlantic Richfield Company*, 199 NLRB 1224, 1225, 1246-47 (1972).

> unfair labor practice. I had always supposed, and I think that both companies and unions have usually supposed, that to call a strike by reason of isolated discriminatory discharges or unwarranted bits of unilateral action would violate a typical "no strike" provision. I still think that this attitude is the only one consistent with sound labor-management relations.[47]

Although the parties have freely agreed to a general no-strike clause fully aware that such a clause has been consistently interpreted to prohibit work stoppages except those prompted by "serious" unfair labor practices, Chairman Fanning and Member Jenkins would in effect rewrite the terms for the parties by substantially increasing the scope of permissible unfair labor practice strikes. The effectiveness of general no-strike pledges would be seriously undermined. A dispute more appropriately resolved through the normal grievance machinery of the contract would be much more likely to escalate into a major conflict.[48]

Another consequence of the overruling of *Arlan's* would be to increase the likelihood that unions will seize upon trivial unfair labor practices in order to engage in a protected mid-term strike designed to further other union aims. Grievance machinery is agreed upon by the parties in order to resolve the inevitable disputes which arise during the life of a contract. The ease with which breaches of contract can be framed as unfair labor

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[47] Archibald Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1 at 17 (1958).

[48] Although no industry would be immune from the destructive effects which would flow from an overruling of *Arlan's*, the possible implications are particularly troublesome in the context of the health care industry. See Member Truesdale's incisive discussion of this problem in his concurring opinion.

practices suggests that a union would have ample opportunity to strike during mid-term.[49] Under established Board law, an unfair labor practice strike is a strike which is precipitated in part by an unfair labor practice.[50] There are often accompanying grievances which may be the predominant or primary reason for striking. Thus, a union could seize upon any unfair labor practice to strike in order to attempt to force the employer to capitulate concerning other grievances which the union would prefer not to process through the grievance procedure. Although clearly contrary to the spirit of a general no-strike clause which does not countenance such mid-term strikes, these tactics would be feasible if the Board overruled *Arlan's.*

Arlan's serves as an effective deterrent to spontaneous interim strikes in violation of the no-strike clause. Wildcat strikes are, of course, anathema to responsible unions as well as employers. As a result of a decision to reverse *Arlan's* and substantially increase the scope of permissible unfair labor practice strikes, minor unfair labor practices may explode into wildcat strikes despite the union's preference for a more orderly forum for the resolution of the dispute. Such an unfair labor practice

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[49] As one commentator has noted:

> When the Union has agreed that the employees will not engage in any strikes, and both parties have agreed to resolve contractual disputes through the grievance-arbitration machinery, the relative ease with which many employer breaches of contract can be framed as unfair labor practices counsels against finding an implicitly reserved right to strike over every unfair labor practice. [Kenneth Lopatka, "Protection under the National Labor Relations Act and Title VII of the Civil Rights Acts for Employees who Protest Discrimination in Private Employment." 50 NYU L.Rev. 1179, 1272 (1975).]

[50] *Head Division, AMF, Inc.*, 228 NLRB 1406 (1977); *C & E Stores, Inc., D & E Supervalue Division*, 221 NLRB 1321 (1976); *Larand Leisurelies, Inc.*, 213 197 (1974).

striker, under the Fanning-Jenkins view, is engaged in protected activity and is presumably immune from discharge by the employer even if the strike is not authorized by the union.

The overruling of *Arlan's* would have a pernicious influence on the administration of present collective agreements [51] as well as the negotiation of future collective agreements. In return for concessions made to the union at the bargaining table, the employer reasonably expects to have industrial peace for the lifetime of the contract. No-strike pledges are the ultimate assurance for the employer that labor peace will be achieved during the contract term. The Supreme Court has recognized that employers will be reluctant to assume obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the *quid pro quo* undertaking of the union to refrain from striking.[52] Congress has also emphasized that binding no-strike provisions serve to promote the peaceful resolution of industrial disputes. As stated in Senate Report, No. 105, 80th Cong., 1st sess. (1947):

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance

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[51] In 1973, the most recent year for which comprehensive data have been published, general no-strike clauses were found in 57 percent of contracts. In an additional 28 percent of contracts, the no-strike ban was lifted after exhaustion of the grievance procedure, if the arbitration award is violated or if the company refuses to arbitrate. "Basic Patterns in Union Contracts," at 90 (BNA, 1975).

[52] *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970).

> of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

To the extent that a union cannot or will not deliver on its solemn pledge not to strike during mid-term, the confidence of the parties to the collective-bargaining relationship will be undermined. If unions were free to ignore no-strike obligations any time an unfair labor practice occurs, employers during collective bargaining would be reluctant to agree to binding arbitration or other *quid pro quo* concessions to unions since a no-strike clause would no longer be as good an assurance that uninterrupted operation will result.

III.

As noted above, the Third Circuit did not contemplate discarding the *Arlan's* rule. Rather, the court asserted that recent developments in labor law favoring the peaceful resolution of industrial disputes have undermined the principle that employers can automatically resort to self-help once a union or employees strike in breach of a no-strike clause. Therefore, the court would modify *Arlan's* by requiring the employer when faced with an unprotected strike to exhaust the legal and contractual alternatives prior to the utilization of self-help measures. The court emphasized that legally the Company could have compelled completion of the grievance procedure and under the contract it could have taken affirmative steps to have the underlying dispute submitted to arbitration. In the belief that the Board had erroneously ignored equitable considerations, such as "the degree of fault" of the parties for the industrial warfare which occurred, the court directed the Board to consider the relative willingness of the parties to arbitrate the dispute.

With all respect, I believe that court's rejection of the traditional self-help measures available to employers when faced with unprotected concerted activity reflects a fundamental and serious misreading of the basic statutory scheme. The court focused narrowly on the public policy favoring the peaceful resolution of labor disputes, and failed to give appropriate weight to the congressional judgment that the availability of self-help is a critically important means of achieving that goal. The restrictions which the court would impose on an employer's use of self-help represent an improper and unwelcome intrusion into the collective-bargaining process. Further, as discussed in part IIIB, *infra*, even accepting *arguendo* that employers are required to take "certain precautions" before resorting to "the tooth and claw of industrial warfare," the facts of this case demonstrate that the Employer did attempt to channel the dispute into the contractual grievance procedures, and that during the more than 2 months that the Company withstood the strike prior to resorting to self-help it indicated its willingness to arbitrate despite the Union's breach of the no-strike clause.

A.

Employees can never engage their employer in economic battle and at the same time enjoy complete job security.[53] In the case of protected concerted activity, however, Congress has limited the responses available to management. Thus, under normal circumstances, a "protected" striker

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[53] The Supreme Court has stated that Sec. 8(a)(3) of the Act has been consistently construed "to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. . . . Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise." *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 311 (1965).

may be replaced, but cannot be discharged.[54] By contrast, when unions or employees utilize tactics or pursue goals which the Act neither protects nor specifically prohibits, the employees are acting largely outside the purview of the National Labor Relations Act.[55] The risks are greater because the Act does not impinge on the employer's responses. As a practical matter, of course, the effectiveness of employer self-help will depend on the relative economic strength of the parties.

Prior to the court's decision, I had considered it well settled that a no-strike clause in a collective-bargaining agreement establishes a condition of employment and that employees who violate such a provision are engaged in unprotected activity and are subject to discharge for cause.[56] Thus, in *Mastro Plastic*, the Supreme Court noted that "individuals violating such clauses appropriately lose their status as employees."[57] Similarly, the Board has consistently adhered to the principle that one party to a contract need not perform if the other party refuses in a material respect to do so.[58] Accordingly, if a union strikes in breach of a no-strike provision, the

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[54] *Mackay Radio & Telegraph Co. v. N.L.R.B.*, 304 U.S. 333 (1938).

[55] See, e.g., *W. L. Mead, Inc.*, 113 NLRB 1040 (1955). See also Getman, "The Protection of Economic Pressure by Section 7 of the NLRA," 115 U. Penn. L.Rev. 1195 (1967); Gould, "The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act," 52 Cornell Law Quarterly 672 (1967).

[56] *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 246 (1962); *N.L.R.B. v. Sands Manufacturing Co.*, 306 U.S. 332 (1939). See also H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 39 (1947).

[57] 350 U.S. at 280.

[58] *The Arundel Corporation*, 210 NLRB 525 (1974); *Kellstone, Inc., supra; San Juan Lumber Company*, 154 NLRB 1153, 1155 (1965), affd. 367 F.2d 397 (9th Cir. 1966).

employer is free to exercise the traditional contract remedy of cancellation of the agreement.[59]

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[59] *Marathon Electric Manufacturing Corp.*, 106 NLRB 1171 (1955), affd. *sub nom. Local No. 1113, United Electrical, Radio and Machine Workers of America v. N.L.R.B.*, 223 F.2d 338, 341 (D.C. Cir. 1955), cert. denied, 350 U.S. 981; Accord, *Boeing Airplane Co. v. Aeronautical Industrial District Lodge No. 751, International Association of Machinists*, 188 F.2d 356 (9th Cir. 1951), affg. 91 F.Supp. 596 (D.C. Wash., 1950), cert. denied, 342 U.S. 821 (1951).

The court reproved "the rule that holds a strike in breach of a contract automatically gives the employer the right to terminate the contract." The court cited favorably Professor Cox's recommendation that the factors to be considered in determining whether a breach is material include the length of the strike, the number of employees affected, the injury to the employer, the degree of fault upon the part of the union, and the likelihood that the contract will be honored for the remainder of its term. See Cox, *supra*, 57 Mich. L. Rev. at 19.

Accepting *arguendo* the relevance of these factors, the rescission of the contract under the facts of this case occurred only after the Union's material breach. Thus, prior to canceling the contract, the Employer suffered economic losses occasioned by a strike which lasted over 2 months. This is in sharp contrast to the contract rescission after only a 6-day strike which Professor Cox criticized in *Marathon Electric, supra*. As regards the degree of fault, as discussed more fully *infra*, I remain convinced that the record supports the Administrative Law Judge's finding of no union animus on the part of the Employer and that it was the Union, not the Company, which failed to comply with the grievance procedure.

Professor Cox also suggested that in ascertaining whether the breach was material, "perhaps the line will ultimately be drawn between a more or less spontaneous uprising and a planned resort to economic pressure by union officials in the deliberate disregard of their written obligation." 57 Mich. L.Rev. at 19. On this important point, the Administrative Law Judge found and I agree that: "This case does not involve a spontaneous walkout or work stoppage." 212 NLRB at 340, fn. 16. The Union deliberately abandoned the grievance and arbitration procedures of the contract in preference for self-help measure.

Member Truesdale notes, correctly in my view, *that Arlan's* has served to stabilize collective bargaining by decreasing the legal

Contrary to the Third Circuit, I am convinced that retention of the traditional remedies [60] for employers faced with unprotected breach-of-contract strikes is consistent with contemporary labor policy. The resolution of a dispute by peaceful methods is encouraged when employees know that engaging in a contractually prohibited strike creates the possibility of lawful discharge. Similarly, union leaders are deterred from materially breaching a no-strike clause when one consequence of such action may be the lawful cancellation of a collective-bargaining agreement, with resulting loss to the union of such contractual benefits as dues checkoff.

On the other hand, the court's creation of a duty for employers to exhaust available peaceful remedies before resorting to self-help in response to unprotected activity will tend to encourage industrial strife rather than lessen it. The ability to respond quickly is often the only way to respond effectively in labor relations. Midterm strikes, even of short duration, can totally cripple an employer's business. A union will have a powerful weapon if it can strike in violation of a no-strike provision, with the employer unable to respond in kind to this utilization of self-help prior to the exhaustion of available peaceful alternatives. The strike becomes largely risk-

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opportunity for protected strikes over minor unfair labor practices during the contract term. Nevertheless, Member Truesdale would modify the *Marathon Electric* rule to make it unlawful for an employer to rescind the collective-bargaining agreement where the employer has committed any unfair labor practice, however minor. I cannot agree with this modification of *Marathon Electric* since I am convinced that its effect would be to undermine the efficacy of *Arlan's* as a deterrent to strikes in response to minor unfair labor practices.

[60] When Congress added the 10(c) proviso in 1948 protecting an employer's right to discharge an employee for cause, it characterized the violation of collective-bargaining agreements as "undesirable activities . . . not to have any protection under the Act." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 39 (1947).

free since the union, under the court's theory, can always embrace a peaceful forum before the employer has the right to respond with self-help measures. Although the union may later be held liable for the resulting damages, this remedy is neither immediate nor effective in deterring breach-of-contract strikes when compared to discharge or rescission.

The court perceived an inconsistency between the use of self-help by the employer and the command of the statute that peaceful resolutions are preferred over industrial strife. However, the national labor relations policy favoring peaceful resolutions of industrial disputes exists side by side with the availability to the parties of self-help pressure devices. Although there are instances where self-help is disruptive to the immediate parties as well as bystanders, experience has demonstrated that the availability of self-help is indispensable to effective collective bargaining. One astute labor law expert has opined that "the 'prospect' of a cessation of work is the most effective strike deterrent ever devised even though it doesn't work 100 percent of the time . . . ." [61] Indeed, the Supreme Court has stated, "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." [62] The Supreme Court has admonished that the Act does not give the Board or the courts the authority to regulate or deny the availability of economic weapons to either party of the collective-bargaining relationship.[63] The regulation of the choice of

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[61] Theodore Kheel, letter to the editor, *The New York Times*, September 4, 1967, p. 20. Quoted in Derek Bok and John Dunlop, "Labor and the American Community" at 231 (1970).

[62] *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 489 (1960).

[63] *Id.* at 490.

or the timing of the utilization of economic weapons would be a serious disruption of the balance of power established by Congress for the collective-bargaining process.

According to the court, contemporary labor policy militates against sole reliance on *Arlan's* in determining whether the company's poststrike actions were permissible. Basic polestars of contemporary labor policy are identified as follows: (1) arbitration is favored as a substitute for industrial strife;[64] (2) a no-strike clause is the *quid pro quo* for an employer's agreement to submit disputes to arbitration;[65] and (3) where the parties agree on a forum for the peaceful resolution of disputes that agreement may be enforced by an injunction, mandating resort to that forum.[66]

The court interpreted the impact of *Boys Markets* to be far greater than its narrow holding. Thus the court concluded that:

> Given *quid pro quo* arbitration and no-strike provisions in a collective bargaining agreement, we would have no difficulty in concluding that an employer's failure to seek a *Boys Markets* injunction against a strike violating a no strike clause would be an appropriate factor to consider in determining whether subsequent actions were permissible under the National Labor Relations Act. Thus, the availability of a *Boys Markets* injunction effects a *pro tanto* modification of the *Arlan's* rule. A contrary conclusion would be a total perversion of the national

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[64] *Gateway Coal Co. v. United Mine Workers of America, et al.*, 414 U.S. 368 (1974).

[65] *Boys Markets, Inc. v. Retail Clerks Union, Local 770, supra*; *Textile Workers Union of America, AFL-CIO v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

[66] *Id.*

labor policy espoused by Congress and the Supreme Court.[67]

This suggested modification of *Arlan's* is inconsistent with the express acknowledgement in *Boys Markets* that "other avenues of redress" in addition to arbitration remain available to an aggrieved employer on the occasion of a violation of a no-strike provision.[68] Indeed, the Court referred to the right of employers to discharge employees who strike in breach of a no-strike obligation.[69] *Boys Markets* does not represent a repudiation of traditional self-help remedies, rather it is a recognition that these remedies will not always be feasible or effective and, as a consequence, injunctive relief should *also* be made available.[70]

My conclusion that an overly broad interpretation of *Boys Markets* is erroneous is bolstered by the recent Supreme Court decision in *Buffalo Forge* which again emphasized that the *Boys Markets* holding was a "narrow one." [71] In *Buffalo Forge*, the Court held that Federal courts could not enjoin a sympathy strike pending an arbitrator's decision of whether the strike is forbidden by the express no-strike clause contained in the contract.[72] The Court reasoned that a contrary result "would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes." [73] Under the Third Circuit's

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[67] 530 F.2d at 277.

[68] 398 U.S. at 248.

[69] *Id.* at 248, fn. 17.

[70] *Id.* at 248.

[71] *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397, 406 (1976).

[72] *Id.* at 412.

[73] *Id.* at 410.

modified *Arlan's* doctrine, Federal district courts would apparently enjoin strikes promoted by unfair labor practices so long as all the requirements of *Boys Markets* were satisfied and the strike was not in response to "major employer unfair labor practices." Thus, the court implied that before granting an injunction, district courts must make the preliminary determination of whether the unfair labor practice was a "major" one.[74] This suggestion runs counter to the Supreme Court's concern in *Buffalo Forge* that Federal district courts not become embroiled in "massive preliminary injunction litigation." [75]

We now turn to the court's conclusion that the fact that a *Boys Markets* injunction was unavailable to the Company in this case to compel arbitration was a distinction without a difference so far as the evaluation of the Company's poststrike actions is concerned. The court admonished the Board for its failure to consider as a factor "the company's failure to seek peaceful resolution through the grievance procedure and in the arbitral forum." The driving force behind *Boys Markets* and *Buffalo Forge* was to enforce the promises of the parties in order to give the parties what they bargained for.[76] In the instant case, neither party agreed to mandatory arbitration, and yet the Company is, in effect, told that it must take steps to arbitrate or forfeit its rights to use self-help in response to an unprotected strike. Notions of compulsory arbitration are antithetical to the spirit of collective bargaining. As the Supreme Court has noted, "Congress has consistently declined to interfere with free collective bargaining and has preferred that device, or voluntary arbitration, to the imposition of compulsory

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[74] 530 F.2d at 279.

[75] 428 U.S. at 411, fn. 12.

[76] 428 U.S. 407.

terms as a means of terminating labor disputes." [77] The approach of the Third Circuit subordinates free collective bargaining to a single-minded focus on the avoidance of industrial strife. I cannot reconcile this proposed modification of *Arlan's* with the fundamental theme of our labor policy that the elimination of industrial strife is better accomplished through collective bargaining than by administrative or judicial fiat.

B.

Even accepting, *arguendo*, that employers have a duty to exhaust available peaceful alternatives prior to implementing self-help measures, the Company's actions in this case were clearly justified. A fair reading of the record in its entirety fully supports the Administrative Law Judge's holding that it was the Union rather than the Company which abandoned the grievance-arbitration procedures of the contract. It was only after the Union persisted in striking for almost 9 weeks in the face of repeated appeals by the Company to settle the grievance in a peaceful forum that the Company resorted to self-help.

The record demonstrates that the Company did follow the grievance procedure and strove to channel the dispute back into this forum even after the Union prematurely abandoned the grievance procedure and engaged in a breach-of-contract strike. Nevertheless, the court stated that the Company should not only have adhered to the grievance procedure but that it had a duty to seek specific performance of the grievance procedure after the Union went on strike.[78] The court's insistence that the Company had a legal remedy available which would have been conducive to settling the strike must

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[77] *N.L.R.B. v. Burns International Security Services, Inc., et al.*, 406 U.S. 272, 282-283 (1972).

[78] 530 F.2d at 277.

be evaluated in light of the court's silence on whether the company could have obtained a *Boys Markets* type injunction pending compliance with the compulsory grievance provisions of the contract.[79] It is far from clear that such an injunction was available under the facts of this case.[80] Absent a reasonable expectation that the Union's illegal strike would be enjoined pending resolution of a specific performance suit, the Company should not be criticized for rejecting this option as unrealistic. It is unfair to predicate the Company's use of self-help on the exhaustion of a legal remedy which would have left the Company vulnerable to this breach-of-contract strike for an indeterminate amount of time.

Turning to the willingness of the parties to arbitrate, it is important to bear in mind that arbitration under the contract is available once the 5-step grievance procedure is exhausted and the "Union and the Company each furnish *written* consent to utilize arbitration." The court agreed that the strike was not authorized by the collective-bargaining agreement since "the Union failed to exhaust the grievance procedures and did not file a written request for arbitration." [81] Nevertheless, the court later stated that "the only stumbling block to submission of the dispute to arbitration was the consent of the parties. The Union had indicated its desire to arbitrate; the Company never affirmatively sought arbitration." [82]

The court's conclusion that the Union consented to arbitration is based on oral statements made by the Union during the fourth step grievance meeting. International Union Representative McDermott did make several requests for immediate arbitration in conjunction with a

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[79] *Id.* at 277, fn. 17.

[80] See *Buffalo Forge, supra*, 428 U.S. at 409.

[81] 530 F.2d at 272.

[82] *Id.* at 278.

demand that the scheduled change not be put into effect pending the outcome of arbitration proceedings. The Company responded to these requests by urging the Union to "stick to the grievance machinery." At one point a company spokesman also reminded the Union that "the grievance machinery included arbitration." As noted by the Administrative Law Judge, these oral and spontaneous proposals by the Union related solely to *immediate* arbitration and thus "could not possibly be construed as complying with the specific requirements of the contract's grievance and arbitration procedures." [83] There is no evidence that the parties in the past had ever utilized immediate arbitration bypassing the contractually provided for grievance-arbitration procedures. As a practical matter, the Company's refusal to go to immediate arbitration was not unreasonable and would not have worked undue hardship on the Union or the employees. If an arbitrator found a violation of the contract an appropriate remedy would include compensation to the employees for backpay lost and an order that the Company rescind its unilateral change of working conditions. By contrast, postponement of the schedule change pending the completion of immediate arbitration would have entailed the loss of economic savings by the Company if the arbitrator ultimately found the change to be permissible under the contract.[84] Thus the Union wanted arbitration under its own terms but it adamantly refused to pursue arbitration under the terms of the contract. Throughout the 9 weeks of the strike the Union ignored company pleas to return to the grievance procedures of the contract which included arbitration.

As regards the Company's willingness to arbitrate, I am unable to agree with the court's conclusion that the

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[83] 212 NLRB at 340, fn. 16.

[84] The Administrative Law Judge noted that the schedule change was premised on valid economic and business justifications. 212 NLRB at 335, fn. 2.

Company never affirmatively sought arbitration. Prior to the strike, the Company repeatedly advised the Union to follow the contractual grievance and arbitration procedures. Significantly, the Company submitted uncontested evidence that every previous written request by the Union under the contract to proceed to arbitration was met with a written consent by the Company. The Union ignored the Company's advice, abandoned the grievance procedure after the fourth step and went on strike on June 7, the day the scheduled change was to be implemented.

Despite this strike in breach of contract, the Company continued to urge the Union to settle the dispute through the grievance and arbitration provisions of the contract. Thus, on June 11, Plant Manager Bartolemeo sent a letter to the employees and the union committee, which stated in pertinent part:

> Disputes between the Company and Union have arisen before and we were able to resolve them in a fair manner through the grievance and arbitration clauses of the contract. In fact, the very dispute that the strike is over is part way through the grievance procedure. I think from an employee point of view that the grievance procedure and arbitration clause that we have at Allyn's Point is a good one. It allows the use of arbitration and determination as to which of the parties is right by an arbitrator with no affiliation with the Company or Union.
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> I sincerely feel that the resolution to the problem lies in the grievance and arbitration procedure and ask you to encourage your Union leadership to return to the legal and in my opinion morally right means of solving this problem.

During the next 2 months, several other letters were sent to the employees and union committee members

urging them to return to work and informing them that continued participation in the strike could lead to discipline and even discharge.

The Company welcomed the assistance of state mediation officials at various stages of the strike, but these efforts proved fruitless. On July 26, 1971, the Company sent a letter to the State Labor Commissioner officially communicating its "willingness to submit the labor dispute resulting in said strike to arbitration or mediation." A copy of this letter was not sent to the Union, but on August 2 the substance of the letter was communicated to the Union when the Company, in a state court proceeding against the Union, amended its complaint by adding the following paragraph:

> 9. On July 26, the Plaintiff notified the Labor Commissioner of the State of Connecticut in writing of its willingness to submit the labor dispute resulting in said strike or walkout to arbitration or mediation.

This pleading was duly served upon the Union through its attorneys.

I respectfully submit that the court's analysis of the facts is clearly in error. Even though the Union's oral statements indicating a willingness to go to immediate arbitration are considered sufficient by the court, the oral statements by the Company advising the Union to follow the grievance procedure are given little weight by the court. Similarly, the court declined to view the letters sent to the strikers and the union committee as "approaching a written consent to arbitration." Finally, although the court admitted that the letter to the State Labor Commission "might be read as a consent to arbitration sufficient under the collective bargaining agreement," the court was satisfied that there was no evidence that the Union received this letter. Thus, the court

overlooked the fact that the substance of the letter was communicated to the Union via its attorneys.

The court agreed that the Union failed to process the grievance through the fifth step of the grievance procedure, did not furnish a written request for arbitration, and accordingly the strike was in breach of contract. A written request to proceed to arbitration under the contract was predicated on the exhaustion of the grievance procedure. Therefore, there was no need for the Company to furnish a written request to arbitrate since the Union, by its actions, had already abandoned and repudiated the contractual grievance and arbitration procedures. Nevertheless, the Company did take positive steps to communicate its willingness to arbitrate. This case is manifestly not one where the Employer has exploited a technical breach of contract in order to swiftly strike back at the Union through self-help responses. Indeed, the Company withstood the strike for 9 weeks. It remained willing and eager for the dispute to be resolved in a peaceful and orderly fashion. Only after the Union had demonstrated a determination to resist repeated overtures to resolve the dispute through the grievance-arbitration provision of the contract, and had ignored warnings that the Company would resort to more resolute action, did the Company finally respond to the Union in terms of the forum that the Union had chosen, that of self-help.

The court contended that the Company "might as easily have turned the other cheek and taken affirmative steps to get the dispute back in the available forum." [85] Even if I were to accept the proposition that our national labor policy is premised on the principle that either of the parties must "turn the other cheek," surely after enduring the unprotected strike for 9 weeks, during which time the Company took positive steps to settle the dispute in a peaceful forum, the Company was entitled to turn

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[85] 530 F.2d at 281.

to the traditional self-help remedies available to employers.

Finally, the court asserted that "as a practical matter had the company sought a peaceful and orderly resolution of the underlying dispute it is highly probable that the union would have at least suspended the strike." [86] This speculation on the part of the court is without foundation under the circumstances of this strike. The Company did communicate a willingness to arbitrate albeit even accepting the court's insistence that this did not satisfy the contractual requirement of a written consent. The Union, however, remained on strike. If we are to speculate according to probabilities, the Company had responded in kind to every previous written union request for arbitration and it is highly probable that they would have done the same if the Union had chosen to utilize the arbitration sphere.

In view of the foregoing, the Board's original Decision was clearly correct in adopting the Administrative Law Judge's conclusion that "this is a case where the Union, not Respondent, failed to comply with the grievance procedure." [87] In addition, the preceding analysis of the Company's willingness to resolve the dispute peaceably strongly supports the key finding of the original Board Decision that the Company's conduct "was not of such serious nature as to be destructive of the foundation on which collective bargaining must rest," and therefore, under *Arlan's*, did not excuse the Union from adhering to its no-strike pledge.[88] As discussed above, the Company continued to urge adherence to the grievance-arbitration procedures notwithstanding the fact that the Union had abandoned those procedures in preference for

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[86] *Id.* at 278.

[87] 212 NLRB at 341.

[88] *Id.* at 340.

a breach-of-contract strike. The Company never objected to arbitration as countenanced by the contract, in fact it affirmatively sought arbitration on that basis, and only declined to postpone the shift change pending immediate arbitration, as proposed by the Union. The Company's refusal to arbitrate outside the contractual framework was an affirmation of collective-bargaining principles, rather than a renunciation of them.

Turning to the particular unfair labor practice committed by the Company, it is important to bear in mind that what was involved here was a dispute over the *interpretation* of the contract, with the Company contending, and the Union denying, that the agreement authorized the shift change. Specifically, the Company relied on the management rights clause and the "Hours of Work" clause as granting it the authority to make the change unilaterally. The fact that the Administrative Law Judge subsequently disagreed with the Company's interpretation and held that the change was not sanctioned by the contract is hardly sufficient to warrant the conclusion that the Company's conduct constituted a rejection of the tenets of collective bargaining. To the contrary, the Administrative Law Judge found that "there is no evidence that Respondent held any union animus, the parties appear to have long enjoyed a harmonious relationship, and there is no evidence to indicate that Respondent wished to rid itself of the Union." [89]

In *Arlan's*, the Board defined "serious" unfair labor practices as those which are "destructive of the founda-

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[89] *Id.* It is instructive to note that before the Administrative Law Judge the General Counsel conceded that "the unilateralism engaged in by Respondent, even though an unfair labor practice, was not so serious as to label the strike at its inception on June 7 a protected strike if, as alleged by Respondent, said employees went out on strike in violation of the contract's no-strike clause." *Id.* at 338.

tion on which collective bargaining must rest." [90] In part II of my opinion, *supra*, wherein I examined the Board's application of the *Arlan's* rule, I stated that "the key inquiry in every case is whether the company's conduct is indicative of an intent to devastate the integrity of the union or a wholesale negation of its contractual obligations." In Member Truesdale's discussion of *Arlan's*, he refers at one point to unfair labor practices which "undermine the fundamental viability of the collective-bargaining agreement." Measuring the Company's conduct by these standards, I can only conclude that the Board correctly determined in its original Decision that the unfair labor practice in issue here was not "serious" within the meaning of the *Arlan's* rule.

IV.

In conclusion, I strongly believe that *Arlan's* furthers the policies of the Act by encouraging the use of contractual grievance procedures in preference to strikes in violation of no-strike clauses, with the proviso that the organizational integrity of the Union will be protected when the employer commits serious or major unfair labor practices. An examination of contemporary labor policy strengthens my view that *Arlan's* is the correct interpretation of *Mastro Plastics*, and I have therefore voted today to retain *Arlan's* without modification. Finally, I am convinced that the *Arlan's* rule was properly applied by the Board in its original Decision and accordingly I would reaffirm the Board's Order dismissing the complaint in its entirety.

Dated, Washington, D.C. September 17, 1979

JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

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[90] 133 NLRB at 808.

MEMBER TRUESDALE, concurring:

I am separately concurring in order to explain why I agree with the Board's decision to adhere to *Arlan's Department Store*,[91] and why, in this instance, the Employer's unfair labor practices are serious within the meaning of *Arlan's* and *Mastro Plastics*.[92] Of course, under *Arlan's*, a union and employees may not lawfully ignore a no-strike clause during the term of a negotiated collective-bargaining agreement and strike in response to minor or "non-serious" unfair labor practices.

In May 1971, during the term of the collective-bargaining agreement, Respondent announced that it would alter the work schedules of the latex department employees, effective June 7. These changes affected 16 employees, or 13 percent of the work force, and would have resulted in reduced pay in the amount of 18 cents per hour for 1 employee, and $570 a year for the remaining 15.[93] When the Union requested bargaining on the change, Respondent refused. Thereafter, the Union filed a grievance pursuant to the terms of the collective-bargaining agreement. Under that agreement's limited no-strike clause, the Union was free to strike after all five steps in the grievance procedure were completed and certain other conditions were met. On June 7, however, prior to the completion of the fifth step in the grievance procedure, the Union struck.[94] Thereafter, on July 29,

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[91] *Arlan's Department Store of Michigan Inc.*, 133 NLRB 802 (1961) (then-Member Fanning dissenting in part).

[92] *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956).

[93] See the original Decision, *The Dow Chemical Company*, 212 NLRB 333, 335-336 (1974) (then-Member Fanning dissenting in part).

[94] The Third Circuit specifically adopted the finding of the original Board Decision (*sub nom., United Steelworkers of America, AFL-CIO-CLC* [*The Dow Chemical Company*] *v. N.L.R.B.*) that the Union had failed to comply with the grievance procedures of

Respondent began hiring replacements; on August 9 it rescinded the collective-bargaining agreement; and finally, on August 17 it terminated the striking employees.[95]

The original Board Decision held that Respondent had violated Section 8(a)(5) by changing the work schedule unilaterally in contravention of its duty to bargain with the Union. However, the Board further concluded that, under *Arlan's Department Store*, the unfair labor practice was nonserious, and that, therefore, Respondent could lawfully discharge the strikers and use the self-help remedy of rescission of the collective-bargaining agreement.[96]

The Third Circuit thereafter, in a lengthy decision, remanded the case to the Board to review the present Board law in this area and determine whether it is consistent with "the polestars of the national labor policy today . . . that industrial strife is to be avoided and that arbitration or alternative peaceful conflict resolutions are to be favored."[97] Thus, the Board was asked to reassess the relative obligations of the parties to arbitrate and/or to seek other peaceful means of settlement before striking or engaging in other forms of self-help, like rescission of the collective-bargaining agreement. In the context of these policy considerations, the court was further

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the contract and that, accordingly, the strike was not permitted by the contract:

> [W]e would agree with the majority of the Board that the union failed to exhaust the grievance procedures and that it did not file a written request for arbitration. Accordingly, the strike was not one authorized by the contract's limited reservation of a right to strike. [530 F.2d at 272.]

[95] 212 NLRB at 336-338.

[96] *Id.*

[97] 530 F.2d at 281.

concerned with the problem of predictability under the *Arlan's* standard.[98] As a possible substitute for *Arlan's*, the court suggested that the parties be required to arbitrate or, where there was a mandatory arbitration clause, to seek an injunction under *Boys Markets*,[99] pending arbitration. The court's proposed solutions generally restricted the use of self-help to settle labor disputes, for, in its view, the expansion of self-help during the terms of the collective-bargaining agreement was antithetical to "the polestars of the national labor policy today," because it fostered industrial conflict rather than directing the parties to a peaceful forum for conflict resolution.

The Board, too, is greatly concerned with minimizing industrial strife and encouraging stability in collective bargaining. After thorough consideration of the problems raised by the court, however, I do not believe that one possible solution—overruling *Arlan's*—would further the goals of the Act.

To the contrary, overruling *Arlan's* would stimulate conflict. A union, or even temporarily disgruntled employees, would be free to strike during the contract's term in the face of a validly negotiated no-strike clause in response to any employer provocation—no matter how isolated and minor—as long as the employer's conduct was ultimately found to violate some part of the Act. Thus, for example, a strike in response to an angry offhand remark by a low-level supervisor—if the remark were found to violate Section 8(a)(1)—would be lawful, as would be any strike called because of an isolated discharge or other disciplinary action which was later found to violate Section 8(a)(3). Yet these actions by the employer, however deplorable, do not ordinarily undermine

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[98] See discussion *infra*.

[99] *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253 (1970).

the fundamental viability of the collective-bargaining agreement.[100]

Thus, the overruling of *Arlan's* would upset the balance previously struck under the Act between the rights and obligations of union and employer, by permitting drastic self-help action in response to a minor violation—one which does not strike at the very foundation of the bargaining relationship. In my view, such a result is contrary to the Supreme Court's original intent in *Mastro Plastics* to permit strikes only in response to conduct "destructive of the foundation on which collective bargaining must rest" and not as a means of retaliation for every possible employer misconduct.[101]

Thus, contrary to Chairman Fanning and Member Jenkins, I am not convinced that increasing the legal opportunity for strikes over insignificant matters during the contract's terms is consistent with the goal of stability in collective bargaining. On the other hand, I believe that while *Arlan's* has been the law unions and employees have generally used the other forums available to them: arbitration under the collective-bargaining agreement or filing unfair labor practice charges with the Board, an agency created by Congress to minimize industrial strife. This deterrence of strikes during the contract's term is demonstrated by the small number of cases—only eight since 1962—in which the Board has had to determine the lawfulness of such work stoppages under *Arlan's*.[102] If *Arlan's* were overruled, however, I

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[100] There could be exceptions where the record reveals a long history of bad-faith dealings on the part of the employer, or a series of minor violations from which one can infer an intent to undermine the foundation on which collective-bargaining rests.

[101] *Mastro Plastics Corp., supra* at 281.

[102] These cases are as follows: *Paul Biazevich, Dinko Biazevich and Jerry Kusar d/b/a MV Liberator, et al.*, 136 NLRB 13 (1962), enfd. 374 F.2d 974 (9th Cir. 1967), cert. denied, 389 U.S. 913

believe that the number of strikes would inexorably increase, with the risk that minor unfair labor practices would be seized upon, whether to shortcut the grievance-arbitration procedure, or even to force variation in the contract during its terms without collective bargaining.[103]

While overruling *Arlan's* would generally have a negative effect on stability in collective bargaining, the repercussions of such a decision would be particularly serious for the health care industry. Section 8(g) of the Act, as added by the 1974 amendments, requires a labor organization to give health care institution (and the Federal Mediation and Conciliation Service) not less than 10 days notice before engaging in "any strike, picketing, or other concerted refusal to work . . . ." In the legislative history, however, Congress has indicated that no notice is necessary "when the employer has committed unfair labor practices as in *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956) . . . ." S. Rept. 93-766, 93d Cong., 2d Sess. 4 (1974). Thus, the 10-day notice applies unless a union strikes in response to flagrant unfair labor practices. If, however, the Board were to find that *Mastro Plastics* permits strikes in response to any unfair labor practice, despite the presence of a valid no-strike clause, the logical result would be that unions

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(1967); *The Cincinnati Penthouse Club, Inc.*, 168 NLRB 969 (1967); *Poloron Products of Indiana, Inc.*, 177 NLRB 435 (1969); *Daisy's Originals, Inc.*, 187 NLRB 251 (1970); enfd. in relevant part, 468 F.2d 493 (5th Cir. 1972); *Atlantic Richfield Company*, 199 NLRB 1224 (1972); *Kellstone, Inc.*, 206 NLRB 156 (1973), enfd. 493 F.2d 1352 (6th Cir. 1974); *Television Wisconsin, Inc.*, 224 NLRB 722 (1976); and *Adroit Manufacturing Co., Northeast Oklahoma City Manufacturing Company*, 236 NLRB No. 167 (1978).

[103] As noted above, in fn. 10, it could be that a minor violation is the straw that breaks the camel's back, in other words, a series of minor violations from which a pattern of bad faith can be inferred might well fit within the contour of *Arlan's*.

could also strike a health care institution in response to any unfair labor practice, without regard to the notice requirement of Section 8(g). But *Mastro Plastics* is clear: the Court only sanctioned strikes in response to conduct "destructive of the foundation on which collective bargaining must rest." [104]

Some have argued, however, that the proliferation of strikes during the contract could be avoided if employers simply refrained from committing *Arlan's*-type unfair labor practices. This argument assumes too much. In the first place, when a violation is minor, why should a strike in violation of a no-strike clause be permitted at all? Conflicts of this kind, during the terms of a collective-bargaining agreement, should be resolved in a peaceful forum. Secondly, it is often extremely difficult for either an employer or a union to predict whether borderline conduct by the employer is on the right or the wrong side of the Act. Without *Arlan's*, if the employer predicts correctly, and the union is wrong, the union's strike may result in discharge of all the employees and rescission of the collective-bargaining agreement. On the other hand, if the employer is wrong and the union is correct, the union is free to strike over a minor matter which could have been satisfactorily resolved by less draconian means. Neither eventuality is desirable.

By contrast, under *Arlan's*, these situations rarely arise because unions are normally deterred from striking unless they are reasonably certain that the employer has not only violated the Act but also has done so in a

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[104] In two subsequent decisions, the Court stated that *Mastro Plastics* applies to situations involving "flagrant" unfair labor practices. *Drake Bakeries Incorporated v. Local 50, American Bakery & Confectionery Workers International, AFL-CIO*, 370 U.S. 254, 265 (1962); *N.L.R.B. v. Magnavox Company of Tennessee*, 415 U.S. 322, 328 (1974).

flagrant manner. This second criterion creates a buffer zone which, with all respect, I believe the Third Circuit underestimated.

The Third Circuit also criticized *Arlan's* on the ground that, under that decision, it is difficult to predict when the Board will find an unfair labor practice to be flagrant or nonserious. Of course, predictability is important. It is not, however, an end in itself. Rather, our first responsibility is always to effectuate the policies of the Act. In this regard, I agree with Member Penello that experience has shown that it is rarely possible to promulgate clear-cut rules while effectively enforcing the Act. Accordingly, we should not now overturn a rule of law which has encouraged stability in bargaining, solely to eliminate some present uncertainty in result.

Moreover, in examining the *Arlan's* precedents cited at footnote 102, *supra*, it is well to remember that these are the tough cases where the line between "serious" and "non-serious" is uncertain. The Board is not presented with the easier demarcations because these are resolved by the parties independently, or settled under the *aegis* of the General Counsel. Thus, the effectiveness of *Arlan's* is not measured by the tough cases, but by its deterrent effect in more straightforward situations. The appearance of this issue in only eight cases suggests, as stated earlier, that it has been a powerful deterrent in that zone of cases where the legality of the employer's conduct is uncertain, and its impact on the bargaining unit is, at most, minimal.

Thus, I would, in answer to the Third Circuit's thoughtful opinion, adhere to the *Arlan's* decision, while making every effort to attain consistency and predictability of result. Moreover, like my colleagues, I do not think that the Board should require an employer to seek a *Boys Markets* injunction and order compelling arbitra-

tion prior to its using available self-help remedies.[105] In *Buffalo Forge*, the Court made clear that the *Boys Markets* exception to Norris-La Guardia's prohibition on court injunctions of strikes is a narrow one,[106] and that the district courts should proceed with caution in issuing such injunctions. In light of this decision, and its underlying premise of noninterference in labor relations matters, it seems unwise to add another tier of litigation, which, on the one hand, is both expensive and time-consuming, and, on the other, not likely to produce a final resolution to the conflict.[107] Final resolution through the courts is unlikely because of the narrow application of *Boys Markets*, and because arbitration under the compulsion of a court order is less likely to be fruitful, since the degree to which arbitration is successful depends so largely on the willingness of the parties to participate.

Nevertheless, where an employer has committed an unfair labor practice, albeit "minor," it is inequitable to permit the employer to benefit from its unlawful conduct, by allowing it, consistent with *Marathon Electric Mfg. Corp.*,[108] to rescind the collective-bargaining agreement. Accordingly, I would modify the *Marathon Electric* rule to make it unlawful for an employer to rescind the collective-bargaining agreement where it has committed *any* unfair labor practice, however minor. This

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[105] Of course, Respondent here could not seek relief because it did not have a mandatory arbitration clause.

[106] *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, et al.*, 428 U.S. 397, 406 (1976), quoting *Boys Markets*, 398 U.S. at 253.

[107] In *Buffalo Forge, supra* at 401, the Court also expressed concern about district courts becoming involved in these matters.

[108] 106 NLRB 1171 (1955), affd. *sub nom., Local No. 1113, United Electrical Radio and Machine Workers of America v. N.L.R.B.*, 223 F.2d 338 (D.C. Cir. 1955), cert. denied, 350 U.S. 981 (1956).

modification of *Marathon* is more equitable since the employer will not benefit from his wrongdoing. It also corrects the anachronism of *Marathon*, that pure contract principles are allowed to dominate important policies of the Act. Indeed, in *Mastro Plastics* itself, the Court recognized that the policies and purpose of the Act must take precedence over pure contract law, absent an explicit waiver in the contract.[109] Here, I would find that the Act's goal of facilitating collective bargaining and establishing a stable relationship is not fostered by permitting an employer to reject an agreement after a union strikes (albeit unlawfully) in protest of the employer's own unlawful conduct. Thus, I agree with Professor Cox's criticism of the *Marathon Electric* rule as inconsistent with the peculiar nature of a collective-bargaining agreement.[110] I would not, however, analyze the problem, as Professor Cox does, in terms of "material breach of contract" where, as here, we are dealing with an initial unfair labor practice as the precipitating cause of the strike.

Finally, I join the majority in its ultimate resolution of this case because Respondent's unfair labor practice was a serious one, and Respondent, as found by the court, was the least willing to arbitrate.[111] As the majority decision states, "Respondent's proposed changes in the work schedule entailed considerable loss of remuneration to 16 of 19 employees whose shifts were to be changed, a loss that employees could only view as a grave violation of the bargaining obligations required of Respond-

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[109] 350 U.S. at 279-280. And see *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111, 123-124 (1944), where the Supreme Court rejected a common law definition of "employer" as inconsistent with the fundamental purposes of the Act.

[110] Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich L. Rev. 1, 18 (1958).

[111] 212 NLRB at 336.

ent . . . and one that undermined the status and authority of the Union." And, as stated earlier, one employee was transferred to a position which paid 18 cents less per hour, while the remaining employees would lose approximately $570 a year because of the reduction in hours, and loss of overtime, holiday, and premium pay.[112] Certainly, the unilateral reduction in the income of a significant part of the work force—coupled with Respondent's failure to take affirmative steps to obtain binding arbitration of the dispute—constituted a "material, substantial, and significant" change in violation of Section 8(a)(5)[113] which struck at the heart of the collective-bargaining relationship. This is so because Respondent's actions undermined the good faith and trust which are uniquely important to the successful administration of a collective-bargaining agreement. For this reason, I agree with the majority's conclusion that the strike was lawful.

Dated, Washington, D.C. September 17, 1979

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

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[112] In accordance with the court's remand, and for purposes of this case alone, I have, with my colleagues, considered the relative willingness of the parties to arbitrate. Respondent's relative unwillingness to proceed with arbitration exacerbates the seriousness of its unfair labor practice. I was not, however, a Member of the Board when the underlying finding of an 8(a)(5) violation was made.

[113] See, e.g., *Nathan Littauer Hospital Association*, 229 NLRB 1122 (1977).

APPENDIX A

Allen, Dwayne
Allen, Horace
Angeloszek, Stanley
Banas, Joseph
Banker, Paul
Barlow, Alfred
Blatchford, Arthur
Bresnan, Cornelius
Brown, Russell
Bryant, Roland
Butova, Frank
Butremovic, Chas., Sr.
Calkins, John
Caron, Ronald
Cimochowski, Joseph
Clark, George
Daley, John
Delsio, John
Deshefy, Elmer
Dotolo, Jerry
Dziekonski, Mieczyslaw
Faille, Robert
Fear, Delbert
Fenn, Thomas
Foster, Jesse
Gay, Kenneth
Geragotelis, William
Golart, John
Hand, Alvin
Hunter, Bruce
Jolin, Ernest
Jones, Burgess
Jurczik, Peter
Keith, William
Kennedy, John
Kirchner, Martin
Knott, John
Kononchik, Michael
Korenkiewicz, Frank
Lambert, William
Leone, Anthony
MacDonald, Robert
Makara, Joseph
McAvoy, Daniel
Melanson, Robert
Miner, Donald
Morris, George
Newton, Arthur
Parker, Carrol
Ramus, Donald
Rassbach, Merrill
Riley, James
Rodman, William
Rondeau, Roger
Sandman, Robert
Senuta, David
Smith, Alan
Smith, Edward
Spellman, Arbaham
Steven, Howard
Stolz, Ronald
Strickland, Ralph
Tefft, Robert
Tourville, George
Watt, Rodney
White, Stanley
Womble, Robert
Zahaba, Joseph
Suplita, Steven
Suplita, Franklin
Sawicky, William
Parker, Tim

Marchesseault, Ronald
Hewlitt, Richard
Hawkins, Donald
Giacalone, Anthony
Womble, Robert
Wallis, Frank
Murphy, William
Meyers, Julius
Lewis, Ben
Lobacz, Philip
Houle, Joseph
Griffith, John
Donnelly, Paul
DeRusher, Joseph
Doucette, David
Deschamps, Phillip
Cassy, James
Beisiegel, Russell
Bialowas, Matthew
Brusseau, Paul
Blanchard, Earl
Clang, David
Jillson, Carrol
Koreniewski, Ronald
O'Reilly, James
Parkhurst, Charles
Roberts, Eugene
Reil, Joseph
Shakun, Peter

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

WE WILL resume recognizing and bargaining collectively with United Steelworkers of America, AFL-CIO-CLC (formerly International Union of District 50, Allied and Technical Workers of the United States and Canada), as the Union authorized to represent our employees at the Allyn's Point plant, Ledyard, Connecticut, in the following unit:

> All hourly rated employees of the Employer employed at the Allyn's Point plant, exclusive of plant protection employees, office and clerical employees, salaried employees, engineers and professional employees, superintendents, foremen, subforemen, and all supervisors as defined in Section 2(11) of the Act.

WE WILL NOT refuse to recognize or bargain collectively, upon request, with the above-named Union, as the exclusive representative of the employees in the appropriate bargaining unit by unilaterally announcing and scheduling the change from a 7-consecutive-days-on-and 2-days-off workweek to a 5-consecutive-days-on-and-2-days-off workweek.

WE WILL NOT refuse to bargain collectively with the above-named Union by unilaterally canceling the collective-bargaining agreement, which was effective from February 23, 1970, to February 26, 1973, without first notifying or bargaining with the Union concerning said cancellation, and without first obtaining agreement with the Union concerning said cancellation.

WE WILL NOT refuse to recognize and bargain collectively with the above-named Union, as the exclusive bargaining representative of our employees in the appropriate unit described above with respect to wages, hours, and other terms and conditions of employment, by withdrawing recognition from the above-named Union as the exclusive representative of our employees in the above-described appropriate unit.

WE WILL NOT discharge or otherwise discriminate against employees in regard to their hire, tenure of employment, or other terms and conditions of their employment because they have participated in a strike or engaged in other activities protected by the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by the National Labor Relations Act.

WE WILL offer the employees named below immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

Allen, Dwayne
Allen, Horace
Angeloszek, Stanley
Banas, Joseph
Banker, Paul
Barlow, Alfred
Blatchford, Arthur
Bresnan, Cornelius
Brown, Russell
Bryant, Roland
Butova, Frank
Butremovic, Chas., Sr.
Calkins, John
Caron, Ronald
Cimochowski, Joseph
Clark, George
Daley, John
Delsio, John
Deshefy, Elmer
Dotolo, Jerry
Dziekonski, Mieczyslaw
Faille, Robert
Fear, Delbert
Fenn, Thomas
Foster, Jesse
Gay, Kenneth
Geragotelis, William
Golart, John

Hand, Alvin
Hunter, Bruce
Jolin, Ernest
Jones, Burgess
Jurczik, Peter
Keith, William
Kennedy, John
Kirchner, Martin
Knott, John
Kononchik, Michael
Korenkiewicz, Frank
Lambert, William
Leone, Anthony
MacDonald, Robert
Makara, Joseph
McAvoy, Daniel
Melanson, Robert
Miner, Donald
Morris, George
Newton, Arthur
Parker, Carrol
Ramus, Donald
Rassbach, Merrill
Riley, James
Rodman, William
Rondeau, Roger
Sandman, Robert
Senuta, David
Smith, Alan
Smith, Edward
Spellman, Abraham
Steven, Howard
Stolz, Ronald
Strickland, Ralph
Tefft, Robert
Tourville, George
Watt, Rodney
White, Stanley
Womble, Robert
Zahaba, Joseph
Suplita, Steven
Suplita, Franklin
Sawicky, William
Parker, Tim
Marchesseault, Ronald
Hewlitt, Richard
Hawkins, Donald
Giacalone, Anthony
Womble, Robert
Wallis, Frank
Murphy, William
Meyers, Julius
Lewis, Ben
Lobacz, Philip
Houle, Joseph
Griffith, John
Donnelly, Paul
DeRusher, Joseph
Doucette, David
Deschamps, Phillip
Cassy, James
Beisiegel, Russell
Bialowas, Matthew
Brusseau, Paul
Blanchard, Earl
Clang, David
Jillson, Carroll
Koreniewski, Ronald
O'Reilly, James
Parkhurst, Charles
Roberts, Eugene
Reil, Joseph
Shakun, Peter

WE WILL make whole each of the above named employees for any loss of earnings and any other losses he may have suffered by reason of our unlawful discrimination against him, with interest.

THE DOW CHEMICAL COMPANY
(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 74-2163

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

THE DOW CHEMICAL COMPANY,
Intervenor.

Argued Sept. 11, 1975

Decided Jan. 8, 1976

Before ALDISERT, GIBBONS and WEIS, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

The major question in this petition for review and cross-application for enforcement of a National Labor Relations Board order is whether the Board should have considered the effect of *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). The Board found that the company had committed an unfair labor practice, and that the union struck in protest, but that the strike breached a no-strike clause in a labor contract providing for grievance and arbitration procedures. Although we will not disturb the Board's conclusion that the company committed an initial unfair labor practice, we will grant the petition for review of other portions of the Board's order and remand the proceedings to the Board for reconsideration.

I.

The case derives from a dispute between the Dow Chemical Company and a local of the Allied and Technical Workers Union [1] representing latex department employees at the Dow plant in Allyn's Point, Connecticut. Prior to May of 1971, 16 of the 19 latex department employees worked on a "7 and 2" shift—seven days on the job, then two days off; three others worked a regular five-day week. After the company lost a large customer, with a resulting sales drop, it decided to institute a five-day work week for all latex department employees. The company estimated that, as a consequence of the change, the 16 affected employees would earn approximately $570 less annually [2] due to the reduction in hours worked, the elimination of overtime, and the loss of weekend and holiday premiums. The union protested the company's proposed action, contending that the company could not implement the change without first bargaining. The company answered that, under the labor contract's management-rights clause, it could make the change without bargaining.[3]

The collective bargaining agreement in effect at the time contained a no-strike, no-lockout provision which preserved to the union a limited right to strike. The union could not strike, however, unless and until three pre-conditions had been satisfied: first, a five-step grievance procedure had to be exhausted; second, a written

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[1] The International Union of District 50, Allied and Technical Workers, Local 13744 filed the original complaint with the General Counsel to the NLRB. That local has since become a part of the United Steelworkers of America.

[2] The union estimated each affected employee would lose about $1,500-$2,000 annually.

[3] Company Personnel Manager James Johnson stated that the company "would be willing to discuss it, but as far as negotiating, no."

request to proceed to arbitration had to be filed within 30 days of the completion of the five steps; third, the arbitration process had to be completed or refused by the company[4] Step 5 of the grievance procedure provided:

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[4] 7.7 *Strikes and Lock-Outs.*

The Union will not cause or engage in or authorize its members to engage in any strike against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, unless and until all of the Bargaining and Grievance Procedures outlined in this agreement have been exhausted. The Company will not cause or sanction any lock-outs unless and until all of the Bargaining and Grievance Procedures as outlined in this Agreement have been exhausted.

The Bargaining and Grievance Procedure in this Article has not been exhausted until all items, a, b, and c, have been carried out as set forth below:

(a) The Grievance Procedure has been used and completed as set forth in Section 7.1.

(b) The Grievance Procedure has been processed through the last Step in Section 7.1 and the Union or the Company has requested in writing, within 30 days, to proceed to arbitration as per Section 7.2.

(c) The Arbitration Procedure in Section 7.2 has been completed or the Union has been denied the right to the use of arbitration.

App. at 298a. The arbitration provision was broad in scope, and an arbitrator's decision was final and binding. However, submission to arbitration was predicated upon consent. The contract provided:

7.2 *Arbitration.*

Should the Grievance Procedure outlined in 7.1 of this article fail to resolve a problem involving a layoff, a discharge, or the interpretation of any provision of this agreement, such problem may be submitted to any arbitrator or a board of arbitration provided the bargaining committees representing the Union and the Company each furnish written consent to utilize arbitration.

[Footnote continued on page 94]

> Step 5. Should a satisfactory solution not be arrived at in Step 4, the Union chairman of the grievance committee shall so notify the Plant Manager, or appointee, in writing and within ten days the Company shall arrange for the unresolved case to be reviewed by the Midland Division Manager in charge of the Allyn's Point Plant or his appointees.

App. at 296a-97a.

The parties agree that they completed the first four steps of the grievance procedure, with the Step 4 meeting taking place on June 3, 1971. On June 4, the Friday be-

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[4] [Continued]

> The agreement to arbitrate shall contain a statement of the issue or issues to be submitted to arbitration. This statement of issue or issues shall be arrived at by joint action of the Union and Company representatives. The agreement to arbitrate shall also provide that the arbitration decision will be final and binding on both parties. The arbitrator, or the method of selecting an arbitrator or a board of arbitration will be agreed upon by the two bargaining committees. (All expenses incident to the service of the arbitrator shall be paid jointly by the Union and the Company.) (The Company shall not be obligated to pay for time lost in carrying out arbitration).
>
> Separate grievances may not be joined in one arbitration proceeding except by mutual agreement of the parties.
>
> The parties hereto may appoint an impartial arbitrator by mutual agreement; failing to agree on such appointment, an arbitrator shall be chosen from a list of seven names submitted by the Federal Mediation and Conciliation Service.
>
> The arbitrator will be selected from this list by means of the strike-off method, with the Union having the privilege of striking off the first name. The last name remaining will constitute the agreed-upon arbitrator.
>
> The arbitrator shall make no award affecting a change, modification, subtraction, or addition to this Agreement, and shall confine himself strictly to the facts submitted in the hearing, or post hearing briefs, the evidence before him and the terms of the Agreement.

Ibid. at 297a.

fore the schedule change was to be implemented, a union representative, the company's industrial relations manager for the plant, and the company's industrial relations manager for the division encompassing the plant conducted a three-way telephone conversation. Nothing was said about a Step 5 meeting. The following Monday, June 7, a company representative and a union representative addressed about 100 production employees in the plant parking lot. After the meeting, the union representative testified, "the whole thing erupted", with the employees shouting that they were not going to work.[5] Picketing began the next day. Subsequent meetings with state mediation officials failed. During the summer, the company wrote three letters beseeching the employees to discontinue the "unlawful strike". On July 23, the company wrote telling the employees that it would begin hiring replacements July 29. By letter of August 9, the company rescinded the collective bargaining agreement. Eight days later the company terminated the striking employees. Shortly thereafter a majority of the then-employees petitioned the company stating that they no longer wished to be represented by Local 13744. Consequently, by letter dated August 28, the company informed the union that it would no longer recognize the union as bargaining agent for the hourly rated employees at the plant.

II.

When the dispute reached the National Labor Relations Board, the company argued alternatively (1) that it had the right to implement the schedule change under the management-rights clause, and (2) that, if it did not, the union's strike was unprotected activity in derogation of the collective bargaining agreement. Accordingly, the company contended it had the right to rescind the collec-

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[5] Because of the strike, the schedule change was not implemented.

tive bargaining agreement, terminate the employees and refuse to recognize the union as the bargaining agent.

The union, on the other hand, argued that it had complied sufficiently with the grievance procedure so that the strike was not violative of the no-strike clause. Even if the strike did violate the contract, however, the union argued that the strike was in protest of an unfair labor practice and therefore protected activity. Accordingly, none of the company's subsequent actions was permissible.

The administrative law judge's conclusions may be summarized as follows:

(1) The company violated Sections 8(a)(5) and 8(a)(1) by unilaterally announcing and scheduling the shift changes for the latex department.[6]

(2) The union did not complete Step 5 of the grievance procedure, nor did it make a written request for arbitration.

(3) *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956), held that a strike designed, not to modify or terminate a collective bargaining agreement, but "to protest the unfair labor practices of petitioners," *ibid.* at 286, 76 S.Ct. at 359 was protected activity.

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[6] Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" concerning wages, hours, and other terms and conditions of employment. 29 U.S.C. § 158(a)(5).

Section 8(a)(1) of the Act declares it to be an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 158(a)(1). "Accordingly, it has been held that violations of sub-sections (2), (3), (4) and (5) are also violations of Section 8(a)(1)." A. Cox & D. Bok, Cases and Materials on Labor Law 143-44 (7th ed. 1969).

The Court underscored two complementary, congressionally-endorsed policies of labor law: one seeking to preserve a competitive business economy, the other seeking to preserve the rights of labor to organize and bargain collectively for better conditions. *Ibid.* 350 U.S. at 279-80, 76 S.Ct. 349. The Court recognized that, assuming fair representation, a collective bargaining agreement could waive a union's right to strike during the term of the contract. However, it was found that, viewed as a whole, the contract in *Mastro Plastics* dealt "solely with the economic relationship between the employers and their employees." *Ibid.*, 350 U.S. at 281, 76 S.Ct. at 357. Accordingly, there was an insufficient basis for implying that the union had contracted not to strike at all, even against an unfair labor practice.

In *Mastro Plastics* the company's initial unfair labor practice was termed "a flagrant example of interference by the employers with the expressly protected right of their employees to select their own bargaining representative." *Ibid.* 350 U.S. at 278, 76 S.Ct. at 355. Relying upon this finding the NLRB has adopted the rule that "only strikes in protest against *serious* unfair labor practices should be held immune from general no-strike clauses." *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802, 807 (1961) (emphasis added). On the facts of this case, the company's "unilateral conduct, although found to be an unfair labor practice, was not of such serious nature as to be 'destructive of the foundation on which collective bargaining must rest.'" App. at 416a (opinion of administrative law judge, quoting *Mastro Plastics*, *supra*, 350 U.S. at 281, 76 S.Ct. 349). Therefore, the strike that began on June 7 "was unprotected from its inception." *Ibid.* at 417a.[7]

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[7] The General Counsel and the charging party approached this issue differently before the administrative law judge. The union argued that the strike was in protest of a serious unfair labor

(4) The company did not violate Sections 8(a)(5) and 8(a)(1) when it rescinded the collective bargaining agreement, because the union previously had breached the contract's no-strike clause.

(5) The striking employees forfeited whatever rights they had had to reinstatement by participating in the unprotected strike. Accordingly, the company did not violate Sections 8(a)(3)[8] and 8(a)(1) by terminating the striking employees.

(6) Because the terminations were lawful, the company did not violate Section 8(a)(5) by withdrawing recognition of the union.

On these conclusions, the administrative law judge found that no remedial action was appropriate and recommended that the complaint be dismissed in its entirety.

By a vote of two-to-one, a three-member panel of the Board affirmed the administrative law judge's rulings, findings and conclusions, and adopted his recommended order. The majority did not issue an opinion. Member Fanning dissented in part and filed an opinion. He agreed that the company's initial action violated Section 8(a)(5). He stated, however, that he interpreted *Mastro Plastics* to permit strikes in protest of any unfair labor prac-

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practice from its inception. The General Counsel, on the other hand, contended that the strike that began on June 7 as an unprotected activity was converted into an unfair labor practice strike, particularly by the company's cancellation of the contract. The administrative law judge rejected the General Counsel's argument, because he found the rescission of the contract was permissible. App. at 419a. Because of the view we take, the distinction between the arguments advanced need not detain us.

[8] Section 8(a)(3) of the National Labor Relations Act makes it an unfair labor practice to discriminate in regard "to hire or tenure of employment or any term or condition of employment" on the basis of membership in a labor organization. 29 U.S.C. § 158(a)(3).

tices, not just serious ones; moreover, assuming *Arlan's Department Store* to be the rule, the company's violation of the Act was a serious unfair labor practice. Thus, the company was not justified in cancelling the contract, terminating the employees, or withdrawing recognition.

III.

As the case comes to us, the first two conclusions of the administrative law judge do not present difficult issues.

First, we find substantial evidence in the record viewed as a whole to support the Board's conclusion that the management-rights clause did not justify the unilateral implementation of the shift changes. Accordingly, we agree with the Board that the company violated Sections 8(a)(5) and 8(a)(1).

Second, in its petition for review, the union does not press the contention that it had complied sufficiently with the grievance procedure so that the strike was one authorized by the collective bargaining agreement. In any event, we would agree with the majority of the Board that the union failed to exhaust the grievance procedures and that it did not file a written request for arbitration. Accordingly, the strike was not one authorized by the contract's limited reservation of a right to strike.

The remaining issues are infinitely more complex. We proceed, then, to the questions of whether the union's strike was otherwise protected and, if not, what consequences are appropriate.

IV.

Petitioner argues that *Mastro Plastics*, *supra*, stands for the proposition that strikes in protest of unfair labor practices are protected activity, irrespective of the nature of the initial unfair labor practice. Alternatively, petitioner contends that, under the Board's *Arlan's Depart-*

ment Stores decision, *supra*, the company's unfair labor practice was "serious" and, therefore, the strike was protected activity. The Board takes the position that *Arlan's* controls, and that the Board did not abuse its discretion in finding the company's unfair labor practice "nonserious". The intervenor-company argues alternatively (a) that it did not commit an unfair labor practice and (b) that, if it did, it was not a serious one.

We decline the invitation to resolve this case by simply pigeon-holing it as within the rule of *Mastro Plastics* or that of *Arlan's*. In *Arlan's*, the Board observed that *Mastro Plastics* "must be understood in its setting". 133 N.L.R.B. at 804. The Board was speaking of the *factual* setting. We agree. However, both *Mastro Plastics* and *Arlan's* also must be understood in terms of their *legal* settings. We perceive fundamental developments in national labor policy since *Mastro* (in 1956) and *Arlan's* (in 1961) that should have commanded the Board's attention. Specifically, the Board did not evaluate whether the company could have avoided abrogating the collective bargaining agreement and terminating the employees had *it* sought to arbitrate the dispute. We turn now to a consideration of the developments in national labor policy which we believe militate against reliance solely on *Mastro Plastics* or *Arlan's* in determining whether the company's post-strike actions were permissible.

A.

Modern labor policy revolves around the collective bargaining agreement. If the agreement is violated, the aggrieved party may bring suit pursuant to Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a). The "substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws", *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1957), even if the suit

is prosecuted in state court, *Humphrey v. Moore*, 375 U.S. 335, 343-44, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964). *Lincoln Mills* specifically held that a union could obtain specific performance of an employer's promise to arbitrate grievances under Section 301(a),[9] irrespective of the requirements of Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107. 353 U.S. at 459, 77 S.Ct. 912. Speaking for the Court, Justice Douglas wrote:

> the Senate Report . . . summed up the philosophy of § 301 as follows: "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."
>
> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.
>
> To be sure, there is a great medley of ideas reflected in the hearings, reports, and debates on this Act. Yet, to repeat, the entire tenor of the history

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[9] Justices Burton and Harlan disagreed with the proposition that federal law was the substantive law to be applied in a Section 301 suit, but concurred in the result on the ground that "[t]he power to decree specific performance of a collectively bargained agreement to arbitrate finds its source in § 301 itself, and in a Federal District Court's inherent equitable powers, nurtured by a congressional policy to encourage and enforce labor arbitration in industries affecting commerce." 353 U.S. at 460, 77 S.Ct. at 919. (footnotes omitted). Justice Frankfurter filed his classic dissent.

> indicates that the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement. And when in the House the debate narrowed to the question whether § 301 was more than jurisdictional, it became abundantly clear that the purpose of the section was to provide the necessary legal remedies.

Ibid., 353 U.S. at 454-55, 77 S.Ct. at 917.

B.

Three years after the *Lincoln Mills* decision, in the *Steelworkers Trilogy*[10] the Court enunciated the now well-known presumption of arbitrability for labor disputes:[11]

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S.Ct. 1347, 4 L.Ed.2d

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[10] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

[11] As the Court stated in *Gateway Coal Co. v. UMW*, 414 U.S. 368, 377, 94 S.Ct. 629, 636, 38 L.Ed.2d 583 (1974), the "federal policy favoring arbitration of labor disputes is firmly grounded in congressional command. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), states in part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

1409 (1960) (footnote omitted). Thus, the arbitral forum is the primary arena for the settlement of labor disputes.[12] Murphy & Sterlacci, *A Review of the National Labor Relations Board's Deferral Policy*, 42 Fordham L.Rev. 291, 300 (1973). As the Court recently observed, the *Steelworkers Trilogy* also elaborated the basis for the policy—"that commercial arbitration and labor arbitration have different objectives. In the former case, arbitration takes the place of litigation, while in the latter 'arbitration is the substitute for industrial strife.'" *Gateway Coal Co. v. UMW*, 414 U.S. 368, 378, 94 S.Ct. 629, 637, 38 L.Ed.2d 583 (1974), quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra*, 363 U.S. at 578, 80 S.Ct. 1347.

C.

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970), extended the theories of both *Lincoln Mills* and the *Steelworkers Trilogy*. *See ibid.* at 241-44, 248. Reasoning that the literal, anti-injunction terms of the Norris-LaGuardia Act must be accommodated with the subsequently enacted Section 301 of the Labor Management Relations Act and the purposes of labor arbitration, the Court held

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[12] The NLRB itself has adopted a policy whereby it defers 8(a)(5) cases to the arbitral process when the collective bargaining agreement provides for arbitration. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). Those circuits which have reviewed this policy have embraced it. *Local 2188, IBEW v. NLRB*, 161 U.S. App.D.C. 168, 494 F.2d 1087, *cert. denied*, 419 U.S. 835, 95 S.Ct. 61, 42 L.Ed.2d 61 (1974); *Associated Press v. NLRB*, 160 U.S. App.D.C. 396, 492 F.2d 662 (1974); *Nabisco, Inc. v. NLRB*, 479 F.2d 770 (2d Cir. 1973); *see* cases cited in *Associated Press, supra*, 492 F.2d at 668 n.24. *But cf. NLRB v. Railway, Airline & Steamship Clerks*, 498 F.2d 1105, 1109-10 (5th Cir. 1974). We have not yet had occasion to address the merits of the *Collyer* doctrine and hereby express no opinion thereon. *See generally* Murphy & Sterlacci, *A Review of the National Labor Relations Board's Deferral Policy*, 42 Fordham L. Rev. 291 (1973).

that Section 301 authorized injunctions against strikes in violation of contracts that called for arbitration of the underlying grievances. In so ruling, the Court emphasized that "consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Ibid.* at 250, 90 S.Ct. at 1592.

Several threads of rationale run through *Boys Markets*. First, the importance of arbitration "as an instrument of federal policy for resolving disputes between labor and management". *Ibid.*, 398 U.S. at 243, 90 S.Ct. at 1588. Second, the availability, at least theoretically, of disparate remedies in state as opposed to federal courts under then-existing law. *Ibid.*, 398 U.S. at 243-46, 90 S.Ct. 1583. Third, the reaffirmation that a no-strike clause is a *quid pro quo* for an employer's agreement to submit disputes to arbitration, coupled with the realization that if the no-strike clause were not enforceable, there would be little incentive for management to agree to arbitration. *Ibid.*, 398 U.S. at 247-48, 90 S.Ct. 1583. Fourth, the belief that an accommodation between the Norris-La Guardia Act and Section 301 was appropriate because "[a]s labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Ibid.* at 251, 90 S.Ct. at 1593.

Thus, *Boys Markets* sanctioned judicial enforcement of a no-strike clause given as a *quid pro quo* for an arbitration clause that is specifically enforceable on the authority of *Lincoln Mills*; so viewed, it is the corollary of *Lincoln Mills*. At the same time, a *Boys Markets* injunction is predicated on submission of the underlying dispute to the arbitral forum; accordingly, *Boys Markets* advances the *Steelworkers* principles as well.

D.

The *Boys Markets* Court characterized its opinion as "a narrow one"; the Court dealt "only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure," 398 U.S. at 253, 90 S.Ct. at 1594, and an explicit no-strike clause. The more recent *Gateway Coal Co. v. UMW*, *supra*, indicates that, although the *Boys Markets* holding may have been narrow, its impact is to be far greater. Specifically, the *Gateway* Court held that "injunctive relief also may be granted on the basis of an implied undertaking not to strike", as well as a specific no-strike clause, 414 U.S. at 381, 94 S.Ct. at 638. Second, the Court held that this court had erred in limiting the presumption of arbitrability to disputes over economic matters; strikes precipitated by safety disputes also could be enjoined. *Ibid.* at 379-80, 94 S.Ct. 629.[13]

E.

As we understand these recent Supreme Court teachings, the basic tenets of contemporary labor policy may be summarized as follows:

(a) Today's interdependent and technologically advanced economy dictates that labor-management relations be as peaceful as possible. *See* Gould, *On Labor Injunctions, Unions, and the Judges: The* Boys Markets *Case*, 1970 Sup.Ct.Rev. 215, 267 (P. Kurland ed.) [hereinafter cited as Gould].

(b) Where labor and management agree on a forum for the peaceful resolution of disputes, that agreement should be honored and may be enforced by an injunction,

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[13] *Gateway* led one commentator to conclude that the Court had added to the "presumption of arbitrability" a "presumption of enjoinability for all labor disputes". 63 Geo.L.J. 275 (1974).

mandating resort to that forum. *Boys Markets, supra*; *see The Supreme Court, 1969 Term*, 84 Harv.L.Rev. 30, 199 (1970); Note, *Giving Strength to the No-Strike Clause: Accommodation to Allow Federal Injunctions*, 46 Notre Dame Law. 526, 541 (1971); Note, *The New Federal Law of Labor Injunctions*, 79 Yale L.J. 1593, 1599 (1970).

(c) Arbitration is a favored alternative forum for dispute resolution. *Gateway, supra*, 414 U.S. at 377, 382, 94 S.Ct. 629; *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 226, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962) (Brennan, J., dissenting) ("a kingpin of federal labor policy"); *Arlan's supra*, 133 N.L.R.B. at 808; *The Supreme Court, 1969 Term*, 84 Harv.L.Rev. 30, 199 (1970); Note, *Labor Injunctions*, Boys Markets, *and the Presumption of Arbitrability*, 85 Harv.L.Rev. 636, 637 (1972).

(d) Congressional emphasis in labor legislation has shifted "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Gateway, supra*, 414 U.S. at 381, 94 S.Ct. at 638; *Boys Markets, supra*, 398 U.S. at 251, 90 S.Ct. 1583, *see* Gould 236; *The Supreme Court, 1969 Term*, 84 Harv.L.Rev. 30, 200-01 (1970).

In our prior decisions, we have sought to adhere to these principles. *Parade Publications, Inc. v. Philadelphia Mailers Union No. 14*, 459 F.2d 369, 374 (3d Cir. 1972), recognized the limitation to *Boys Markets*, namely "that arbitration should be encouraged by permitting judicial enforcement of a 'no-strike' clause when the underlying issue is arbitrable, but that there should be no injunction if the underlying dispute is not arbitrable." This court, however, has not been hesitant to find arbitrability. For example, in *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926*, 502 F.2d 321 (3d Cir.) (in banc), *cert. denied*, 419 U.S. 1049, 95 S.Ct. 625, 42 L.Ed.2d 644

(1974), a labor agreement contained a no-strike clause and a provision that the agreement would not be violated if "an employee honored a primary picket line." *Ibid.* at 323. The parties disagreed whether the picket line honored was primary or secondary. Reasoning that "[r]equiring arbitration does not nullify the union's right to honor a primary picket line, but only suspends the exercise of the right until its existence is established by an arbitrator's decision," *ibid.* at 324, we held that the dispute was covered by the contractual undertaking to arbitrate. Accordingly, we affirmed the district court's issuance of a *Boys Markets* injunction. *Island Creek Coal Co. v. UMW*, 507 F.2d 650 (3d Cir.), *cert. denied*, 423 U.S. 877, 96 S.Ct. 150, 46 L.Ed.2d 110 (1975), extended this rule to a labor agreement in which there was neither an express no-strike clause nor a contractual reference to honoring picket lines. *Ibid.* at 652.[14] More recently, in the context of a Section 301 damage action, we held that the question of whether the collective bargaining agreement had been repudiated was one for the arbitrator. *Controlled Sanitation Corp. v. Dist. 128, International Ass'n of Machinists*, 524 F.2d 1324, 1331 (3d Cir.,

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[14] *Island Creek* articulated a significant distinction:

> Whatever difficulties there may be concerning the scope of the remedy recognized in *Boys Markets*, there would, we assume, be a high degree of unanimity in support of the proposition that if the contract gives the union and the employees the right to grieve and arbitrate a given dispute that remedy must be pursued in preference to a work stoppage. Thus the initial inquiry should not be whether the employer is entitled to an injunction, but rather, whether the underlying dispute is one which the union and the employees could grieve and arbitrate.

507 F.2d at 652 (citation omitted). Subsequently, we gave substance to this distinction by vacating a *Boys Markets* injunction while endorsing the district court's ordering of resort to the grievance procedures. *Jones & Laughlin Steel Corp. v. UMW*, 519 F.2d 1155, 1158-59 (3d Cir. 1975).

1975), *cert. denied*, —— U.S. ——, 96 S.Ct. 1114, 47 L.Ed.2d 319 (1976).

We turn to consider, on the facts of the instant case and with respect to the company's post-strike actions, the appropriate accommodation between these general principles and the older rules of *Mastro Plastics* and *Arlan's*.

V.

Here, first the union and then the company resorted to the tooth and claw of industrial warfare, rather than availing themselves of procedures provided in their collective bargaining agreement and encouraged by the congressionally mandated national labor policy. The union failed to complete the grievance procedure and to invoke arbitration; instead it struck to protest what it considered an unfair labor practice. The company disdained the available arbitral forum and ultimately resorted to rescission of the contract, to discharge of the employees and to termination of the collective bargaining relationship. A more primitive, abrasive and disrupting example of labor-management relations is difficult to imagine. Indeed, the avoidance of such traumatic ruptures in industrial relations is the precise aim of the national labor policy. Yet the Board and the intervenor-company would have us hold that the national labor policy will sanction the company's ultimate actions.

A.

The Supreme Court has instructed since *Lincoln Mills* that a union's no-strike pledge is usually given as a *quid pro quo* for the company's promise to arbitrate specified disputes. The union can compel arbitration, *Lincoln Mills, supra*, and the employer can enjoin a strike in violation of the no-strike clause, *Boys Markets, supra*. When an employer seeks to enjoin such a strike, the task of the court is two-fold: (a) to determine

whether the parties have agreed to arbitrate the underlying dispute;[15] (b) if so, whether the employer is entitled to an injunction.[16] *Island Creek Coal Co.* (*supra* n. 14); *see Gateway, supra*, 414 U.S. at 374, 94 S.Ct. 629.

Given *quid pro quo* arbitration and no-strike provisions in a collective bargaining agreement, we would have no

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[15] This task in turn involves determining (a) whether the parties agreed to arbitrate generally and (b) whether the agreement to arbitrate is susceptible of an interpretation that covers the specific dispute.

[16] The district court must "consider whether issuance of an injunction would be warranted under ordinary principles of equity —whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." *Boys Markets, supra*, 398 U.S. at 254, 90 S.Ct. at 1594; *see Gateway, supra*, 414 U.S. at 387-88, 94 S.Ct. 629. We have suggested previously that a rupture in the *status quo* of working conditions during grievance and arbitration proceedings may constitute irreparable harm to a union *qua* union. *Newspaper Delivery Drivers, Local 211 v. Pittsburgh Press Co.*, No. 72-2141 (3d Cir., Dec. 26, 1972). We have no occasion at this time to decide whether a company could prove irreparable injury on an analogous theory.

See also Note, *The New Federal Law of Labor Injunctions*, 79 Yale L.J. 1593, 1599 (1970) ("the power should be limited to those situations where the policies of ensuring industrial peace through arbitration and of promoting freedom of contract by enforcing collective bargaining agreements *both* clearly support the granting of an injunction"); 88 Harv.L.Rev. 463, 470 (1974) (suggesting as a further requirement a finding of probable success on the merits).

The procedural requirements of Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, remain applicable so far as consistent with the policies of Section 301. *Celotex Corp. v. Oil, Chemical & Atomic Workers*, 516 F.2d 242, 246 (3d Cir. 1975). For the proposition that Sections 7-12 inclusive of the Norris-LaGuardia Act, 29 U.S.C. §§ 107-112, provide safeguards against improper restraining orders see Note, *The New Federal Law of Labor Injunctions*, 79 Yale L.J. 1593, 1606-08 (1970).

difficulty in concluding that an employer's failure to seek a *Boys Markets* injunction against a strike violating a no-strike clause would be an appropriate factor to consider in determining whether subsequent actions were permissible under the National Labor Relations Act. Thus, the availability of a *Boys Markets* injunction effects a *pro tanto* modification of the *Arlan's* rule. A contrary conclusion would be a total perversion of the national labor policy espoused by Congress and the Supreme Court.

B.

Here, however, the arbitration process was elective, not mandatory. The arbitration provision of the contract, *see* n. 4 *supra*, was not coextensive with the no-strike clause. Arbitration could occur only upon written consent of both the union and the company. We are also mindful that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law." *Gateway*, *supra*, 414 U.S. at 374, 94 S.Ct. at 635, *see Local 103, Electrical, Radio & Machine Workers v. RCA Corp.*, 516 F.2d 1336, 1339 (3d Cir. 1975). Accordingly, we agree that a *Boys Markets* injunction against the strike and requiring arbitration was unavailable to the company as a remedy.

Although arbitration was not compulsory, compliance with the grievance procedure was mandatory. The preamble to the grievance article stated in pertinent part:

> It is the intent of this article to provide an efficient means of satisfactorily adjusting complaints and grievances at the job level. To that end it is agreed that the following steps shall be followed in numerical order so that both the Union and the Company strive for an early settlement at the lowest level within this procedure.

App. at 296a. The contract also barred strikes, *inter alia*, unless and until the grievance procedure had been com-

pleted. *See* pp. 268, 270 *supra*. Thus, the contract contained a more limited *quid pro quo* arrangement than usual: the union agreed not to strike during the grievance procedure; in return, the company agreed to follow the grievance procedure and to "strive for an early settlement at the lowest level within this procedure." As the dispute developed, however, the union struck on the day the company planned to implement the schedule change; the company did not write its Step 4 "disposition" until several days later. App. at 150a; 320a-24a. The company took no further action with regard to its duty to follow the grievance procedure.[17] Significantly, it did not seek specific enforcement of the agreement to follow the grievance procedure. *See Lincoln Mills, supra*, 353 U.S. at 454, 77 S.Ct. 912, 1 L.Ed.2d 972; *Jones & Laughlin Steel Corp. v. UMW*, 519 F.2d 1155 (3d Cir. 1975).

Furthermore, even though *Boys Markets* was unavailable to the company to compel arbitration, the arbitral forum was not closed to the company. Arbitration was available when the grievance procedure "fail[ed] to resolve a problem involving . . . the interpretation of any provision of this agreement." The underlying dispute in the instant case revolved around the interpretation of the management-rights clause. Therefore, the problem clearly was susceptible to resolution in the arbitral forum. *See* n. 15 *supra*. The only stumbling block to submission of the dispute to arbitration was the consent of the parties. The union had indicated its desire to arbitrate; the company never affirmatively sought arbitration.

The company did send several letters to union members, *inter alia*, asking them to encourage their leaders "to return to the legal and . . . right means of solving this problem." *See* App. at 409a. We see nothing in these

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[17] We do not deem it necessary to reach the question whether the company could have obtained a *Boys Markets*-type injunction pending compliance with the compulsory grievance provisions.

letters approaching a written consent to arbitration. *See ibid.* at 341a-47a. On July 26, 1971, the company wrote the Connecticut Labor Commissioner a letter stating, *inter alia*, "The Dow Chemical Company hereby notifies you, as Labor Commissioner of the State of Connecticut, of its willingness to submit the labor dispute resulting in said strike or walkout to arbitration or mediation." *Ibid.* at 348a. There is nothing in the record to indicate that the union received this communication which might be read as a consent to arbitration sufficient under the collective bargaining agreement before the company terminated the collective bargaining agreement on August 9, 1971. *See ibid.* at 162a-65a, especially at 164a. *See also ibid.* at 209a-10a.

Twice during the Step 4 meeting the union representative suggested that the issue be submitted to arbitration immediately, bypassing Step 5. In one case the company representative said "stick to the grievance procedure", and in the other the company representative did not give a direct answer. *Ibid.* at 145a-48a; 197a-201a. At the end of the Step 4 meeting, the union representative told the company representative not to put the schedule change into effect, but to settle the dispute in court or through arbitration. *Ibid.* at 200a. The company pursued neither alternative.

Accordingly, we believe that, although *Boys Markets* was unavailable to the company to compel arbitration, this conclusion begs the pivotal question: whether the company, having failed to take positive steps to have the dispute resolved peacefully, can build a sanctuary for subsequent actions in derogation of its previously harmonious relationship with the union. As a practical matter, had the company sought a peaceful and orderly resolution of the underlying dispute, it is highly probable that the union would have at least suspended the strike.

Reducing this case to its bare essentials, we observe that labor and managment agreed to grieve disputes and

to submit disputes to the arbitral forum upon consent; that management never sought to force completion of the grievance procedure; that management did not communicate to the union before terminating the contract its consent to arbitrate; and that industrial strife ensued. The company could have compelled completion of the grievance procedure or communicated to the union its consent to arbitration, and thereby avoided these traumatic ruptures. We therefore hold that, in evaluating the company's post-strike actions, the Board should have considered as a factor the company's failure to seek peaceful resolution through the grievance procedure and in the arbitral forum.

C.

The decision we reach today is guided in the first instance by jurisprudential guideposts in recent Supreme Court pronouncements on national labor policy. But prudential considerations also have influenced our disposition. We have grave doubts that the Board's resort to the *Mastro Plastics/Arlan's* formula furthers the cause of industrial peace. The principals to a labor dispute cannot know with any degree of certainty whether the Board will deem a company's actions unfair labor practices and, if so, whether it will label them "serious" or "nonserious". The answers, like beauty, may lie in the eye of the beholder.[18] Under the Board's decision in this

[18] The record before us demonstrates that no bright line of demarcation separates the two types of unfair labor practices. Of three distinguished, expert members of the Board, two found the company's unilateral decision to change the work shifts to be a "nonserious" violation of Section 8(a)(5). A third member found that, "even applying the test of 'experience, good sense, and good judgment' of the majority opinion in *Arlan's*, the unfair labor practice committed by [the company] must be judged sufficiently serious to warrant the employees taking concerted action outside the grievance-arbitration provisions of the contract." App. at 442a (Member Fanning, dissenting).

case, the union that chooses to strike because it believes (1) the company has committed an unfair labor practice and (2) it is a "serious" one, may find itself ousted as a collective bargaining agent and its members terminated if a majority of the Board, upon detached reflection, disagrees with only the second conclusion.

The Board has said that the "test [it] has to apply in most of its cases [is] experience, good sense, and good judgment"; "[i]n this field, lines between the licit and illicit can rarely be drawn clearly in advance. And in the penumbral areas which are omnipresent, there is no substitute for niceties of judgment." *Arlan's, supra*, 133 N.L.R.B. at 807. While we agree with these sentiments in principle, we emphasize the importance of constricting the numbers and contours of "penumbral areas." Industrial peace requires that companies and unions alike extract maximum stability, predictability, and reckonability from labor board decisions. Labor and management have the right to understand labor law in the context of a paraphrase of Holmes' aphorism: "The prophecies of what the [NLRB] will do in fact, and nothing more pretentious, are what I mean by the law [of labor]." Holmes, *The Path of the Law*, 10 Harv.L. Rev. 457, 461 (1897). Under our decision, a union will still be placed on the horns of a dilemma when it believes the employer has committed an unfair labor practice. The company faced with a resultant strike, however, will know that it should take certain precautions before resorting to such self-help as cancellation of the contract, termination of employees and refusal to recognize the union.

While seeking to further the interests of stability, predictability and reckonability in the area of labor law, our decision does not detract from the important role of the Board in formulating and administering national labor policy. We recognize that a dispute, such as that

underlying this case, involving a claimed unfair labor practice is within the Board's primary jurisdiction. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). As noted above, however, the Board itself has adopted a policy of deferring certain Section 8(a)(5) charges to the arbitral forum. *See* n. 12 *supra*. Moreover, although an issue may be within the Board's exclusive jurisdiction, if it arises in the context of a breach of the collective bargaining agreement, it falls within the jurisdiction of the federal courts under Section 301. *Smith v. Evening News Ass'n*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). Under our decision, the Board may play a key role in future disputes such as that at bar. If a union strikes to protest an alleged unfair labor practice, and if the company counters by seeking a *Boys Markets* injunction, the federal court may require the posting of a bond, may preliminarily enjoin the strike, and may solicit the expertise of the Board in the form of an amicus brief. *See* Gould 257-58. Such a solution will further the national labor policy favoring peaceful resolution of most labor disputes through the arbitral forum, while safeguarding the union's interests in protecting its organizational integrity from major employer unfair labor practices as recognized in *Mastro Plastics, supra*.

VI.

One other aspect of the Board's decision requires comment. The administrative law judge found that the union's strike in breach of the contract justified the company's unilateral cancellation of the entire collective bargaining agreement. As primary authority, he relied on *Marathon Elec. Mfg. Co.*, 106 N.L.R.B. 1171 (1953), *enforced sub nom. United Elec., Radio & Machine Workers v. NLRB*, 96 U.S.App.D.C. 46, 223 F.2d 338 (1955), *cert. denied*, 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 850 (1956). Just as we believe recent developments in labor

law have depleted the force of the *Mastro Plastics/ Arlan's* formulation, so also we believe that strict application of the doctrine of material breach derived from contract law is inconsistent with contemporary national labor policy.

At the outset we observe that *Childern's Rehabilitation Center, Inc. v. Service Employees*, 503 F.2d 1077 (3d Cir.), *cert denied*, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 682 (1974), is not to the contrary. There, the union had acquiesced in the company's termination of the labor contract, *ibid.* at 1079, and the sole issue before the court was whether the employer could recover, in a Section 301 suit, damages for the period between the initial breach of the agreement and the company's termination. Our narrow holding was that "the loss of the right [the company] otherwise would have to collect damages for a breach is not an unfair price for an employer to pay if it insists upon total and permanent relief from the obligations it accepted under a labor contract." *Ibid.*

In the more general circumstances presented here, we agree with the views expressed by Chief Judge Seitz, *Ibid.* at 1080. Indeed, the concerns there expressed are identical to those more fully set forth in Part IV *supra.* Accordingly we disapprove the rule that holds a strike in breach of a contract automatically gives the employer the right to terminate the contract. As Professor Cox observed some years ago in criticizing the *Marathon Electric* rule:

> A collective bargaining contract is made to be broken. The number of people involved, both as employees and as supervisors, makes large and small violations inevitable. This is one reason for the grievance procedure and arbitration. Collective agreements are negotiated for substantial periods after much travail. There are enormous pressures to reach agreement. There will be no rules to govern

> the enterprise if the contract is set aside. These are proper factors to evaluate in determining whether a breach is material. They *argue for continuing the contract and leaving the injured party to his legal or contractual remedies.* Consequently, I am skeptical of the trend toward holding that a strike in breach of contract automatically gives the employer the right to terminate the agreement. There would seem to be room for judgment based upon the length of the strike, the number of employees affected, the injury to the employer, *the degree of fault upon the part of the union*, and the likelihood that the contract will be honored for the remainder of its term.

Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich.L.Rev. 1, 18-19 (1958) (footnote omitted and emphasis added).[19]

Here, the company had both legal and contractual remedies available to it short of contract termination. Legally, it could have compelled completion of the grievance procedure or filed a Section 301 damage suit. Under the contract, it could have taken affirmative steps to have the underlying dispute submitted to arbitration. It did neither. In its brief, the NLRB appears to cast total blame for this rupture in labor relations on the union. The Board says the union "refus[ed] to fully process the grievance [thereby] preclud[ing] an orderly resolution of the dispute." Brief for NLRB at 29; *see ibid.* at 30. This analysis, however, does not reach "the *degree* of fault upon the part of the union." As recited at length in Part V *supra*, it was the company's reluctance to arbitrate which precluded a peaceful resolution of the underlying dispute. Indeed, it was the company's

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[19] *See also* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif.L.Rev. 663 (1973), especially at 797-99 & n.522.

unfair labor practice that precipitated the strike. Now, it is the company's theory which would pervert the national labor policy. We decline the invitation to contribute to such a result. In short, analogies between contract principles and the law of labor agreements are helpful to a point; when an analogy would dictate a result contrary to the paramount interests in labor peace, however, it should not control. *See United Steelworkers of America v. Warrior & Gulf Navigation Co., supra*, 363 U.S. at 578-81, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

VII.

To summarize, the polestars of the national labor policy today are that industrial strife is to be avoided and that arbitration or alternative peaceful conflict resolutions are to be favored. The contract between the union and the company prohibited strikes unless and until a grievance and arbitration procedure had been exhausted. The union struck prematurely. The company then joined the union in resort to the tooth and claw of industrial warfare when it might as easily have turned the other cheek and taken affirmative steps to get the dispute back in the available arbitral forum. The Board reasoned that the strike was an unprotected, material breach of the contract because the company's initial unfair labor practice was "nonserious"; it overlooked the company's failure to resort to available, peaceful alternatives. In light of recent trends in labor policy, we find error in this oversight. We, therefore, will grant the petition to review the order of the Board and will deny the cross-application for enforcement of the Board's order. In the view we take, we do not disturb the Board's conclusion that the company violated Sections 8(a)(5) and 8(a)(1) by unilaterally announcing and scheduling a change in the work schedule of latex department employees. We will remand for reconsideration of all other aspects of the proceedings in accordance with the foregoing.

APPENDIX E

212 NLRB No. 50
FKP
D-8810
Ledyard, Conn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 1-CA-7736

and

1-CA-7821

THE DOW CHEMICAL COMPANY

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
(formerly International Union of District 50, Allied and Technical Workers of the United States and Canada)

and

Case 1-CA-7873

WILLIAM J. KEITH, an Individual

DECISION AND ORDER

On October 30, 1973, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent, and Charging Party each filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. June 28, 1974.

RALPH E. KENNEDY, Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER FANNING, dissenting in part:

I agree with my colleagues in their adoption of the Administrative Law Judge's finding that Respondent unilaterally announced and scheduled the change in the work shift from a 7-consecutive-days-on-and-2-days-off workweek to a 5-consecutive-days-on-and-2-days-off workweek in violation of Section 8(a)(5) and (1) of the Act. However, unlike my colleagues, I find that a cease-and-desist order is needed to remedy such violation and to guarantee that Respondent will bargain with the representative chosen by its employees.

Additionally, I disagree with my colleagues' adoption of the Administrative Law Judge's finding that the strike, beginning on June 7, 1971, was unprotected from its inception, because the Union failed to submit its dispute to arbitration in accordance with the grievance and arbitration provisions of the existing contract, which also contained a no-strike clause,[1] and that Respondent's unilateral conduct, although it constituted an unfair labor practice, was not of such serious nature as to destroy the basis for collective bargaining.

As found by the Administrative Law Judge, Respondent unilaterally and unlawfully announced that it would make changes in the work schedule which would affect 16 of the 19 employees working in its latex department. Such changes, the record shows, would have resulted in the reduction of the hourly rate of at least one employee, the senior head operator whose position would be elim-

[1] The no-strike clause in the contract provides that the Union may engage in strike action after all steps of the grievance and arbitration provisions of the contract have been exhausted. The contract also provides, in addition to the five steps set forth in the grievance procedure, that the Union may not engage in a strike unless or until the Union has made a written request for arbitration after receipt of the step 5 answer, and arbitration has either been completed or refused by the Employer.

inated causing him to be transferred to a new position which paid 18 cents less per hour. Additionally, the record contains the testimony of Gay, the latex department superintendent, who testified that, because of the reduction of hours worked and the elimination of overtime, weekend, and holiday premiums, he estimated the remainder of the employees in the latex department would earn approximately $570 less per year as a result of the announced change in schedule from a 7-consecutive-days-on-and-2-days-off workweek to a 5-consecutive-days-on-and-2-days-off workweek.

Respondent's unlawful unilateral announcement of such proposed changes in working hours, which would have resulted in considerable loss of remuneration on the part of the employees, must necessarily have been viewed by the employees as a grave violation of the bargaining obligations required of Respondent under the Act.

In *Arlan's Department Store*,[2] I dissented from the majority's affirmance of the Trial Examiner who had found that employees who had walked out, notwithstanding the no-strike clause in the contract, to protest the discharge of a steward, had not been engaged in protected concerted activity and could lawfully be discharged. The majority therein noted its refusal to accept a broad interpretation of the Supreme Court's decision in *Mastro Plastics*[3] and stated that the Court had merely rejected the extreme application which the employers sought to give to the general no-strike clause in their contract and upheld the Board's finding that the clause in question did not constitute a waiver of the employees' right to strike in protest against employer unfair labor practices characterized by the Court as "flagrant." Thus, the

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[2] *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802.

[3] *Mastro Plastics Corp., and French-American Reeds Manufacturing Company, Inc. v. N.L.R.B.*, 350 U.S. 270.

majority indicated that it would apply the test of experience, good sense, and good judgment and would find that only strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses.

The discharge in *Arlan's* was held, by the majority, to be a serious matter only to the individual involved, since the discharge was a result of a clash of personalities. Thus, the majority noted, such dispute, although constituting an unfair labor practice, should have been submitted to the contract grievance procedure. Moreover, the majority reasoned that such dispute was not serious in the sense noted by the Court in *Mastro Plastics;* i.e., "destructive of the foundation on which collective bargaining must rest."

Although the facts in this case are somewhat different than *Arlan's*, I find that the views set forth in my dissent therein are equally applicable. In *Arlan's*, I interpreted *Mastro Plastics* as holding that a general no-strike clause in a contract for the term of that contract bars only the right to strike over disputes concerning the economic relationship between the employers and their employees, i.e., an economic strike, and does not bar a strike to protest unfair labor practices in the absence of an express waiver, since such strike, in my view, is outside the scope of the contract. In other words, it is my view that *Mastro Plastics* emphasized that it is the scope and coverage of the contract, and not the degree and kind of unfair labor practices which may be involved, which determines whether the employees have engaged in protected activities.

Applying *Mastro Plastics* to this case leads me to conclude that as Respondent engaged in an unfair labor practice in making its unilateral announcement of change in work schedule and in adamantly refusing to negotiate concerning such change, the employees strike against this

unfair labor practice[4] was not barred by the no-strike clause in that contract and was protected activity. This being so, Respondent's discharge of the strikers and withdrawal of recognition from the Union were clearly in violation of Section 8(a)(1), (3), and (5) of the Act.

Moreover, even applying the test of "experience, good sense, and good judgment" of the majority opinion in *Arlan's*, the unfair labor practice committed by Respondent must be judged sufficiently serious to warrant the employees taking concerted action outside the grievance-arbitration provisions of the contract. The Respondent's unilaterally announced changes in the work shift schedules of the latex department involved the reclassification of some employees into lower paying classifications and substantial wage cuts for the other employees in the department. But the injury suffered by employees in the bargaining unit is not limited to this direct injury to virtually all the employees in the latex depart-

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[4] It is of course clear that the employees went on strike in protest of Respondent's unfair labor practice. Thus, after Respondent announced its decision and refusal to negotiate concerning it, but indicated willingness to talk about the manner and timing of its implementation, the employees withheld strike action and attempted to utilize the grievance and arbitration procedures in an effort to get the decision changed. In practical effect they had exhausted those procedures when Respondent's officials flatly refused the Union's requests to agree to arbitrate the matter in a discussion initiated by Respondent's officials the day before they announced they were going to place the shift change into effect on June 7. The employees were apprised of all these developments, and struck rather than accept Respondent's unlawfully imposed change in rates of pay and conditions of employment. Even accepting my colleagues' premise that the strike violated the letter of the no-strike clause, the violation was technical in nature and does not warrant Respondent's rescission of the contract and withdrawal of recognition. *N.L.R.B. v. State Electric Service*, 477 F.2d (C.A. 5); *Local Union No. 721, United Packinghouse, Food & Allied Workers, AFL-CIO v. Needham Packing Co. d/b/a Sioux City Dressed Beef*, 376 U.S. 247; *Drake Bakeries Inc. v. Local 50, American Bakery & Confectionery Workers International, AFL-CIO*, 370 U.S. 254.

ment. "For the real injury in this case is to the union's status as bargaining representative," [5] an injury affecting all employees in the bargaining unit. "Experience" informs us that wage reductions are among the most sensitive issues in labor relations. "Good sense" tells us that an unlawfully imposed wage cut will provoke employees into withholding their labor. "Good judgment" demands that before a no-strike clause be construed as applying to strikes protesting unfair labor practices there be clear and unmistakable language in the contract to that effect.[6] It demands as well consideration of the fact that the Union and the employees withheld strike action and continued to utilize the grievance provisions of the contract in an attempt to force the Respondent to the bargaining table up to the time that Respondent decided to implement the announced change. Considering these circumstances, it is clear that responsibility for the strike rests more upon Respondent as perpetrator of the unfair labor practice than upon the Union and the employees who sought to utilize peaceful means of securing their statutory rights and only desisted therein when brought face to face with a *fait accompli*. There are few actions more "destructive of the foundation upon which collective bargaining must rest" [7] than unilateral action which undermines the status and authority of the collective-bargaining representative.[8]

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[5] *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421. Moreover, in considering the seriousness of the unfair labor practice, it is relevant that the changes unilaterally made by Respondent were in essence the sort of changes which it unsuccessfully sought authority to make during collective-bargaining negotiations with the Union, and which it then vowed "to get during the life of this contract."

[6] *Mastro Plastics Corp., supra*, 283.

[7] *Mastro Plastics Corp., supra*, 281.

[8] Unless it be Respondent's subsequent action of terminating the unfair labor practice strikers and withdrawal of recognition of the Union as their collective-bargaining representative.

Accordingly, even on the basis of *Arlan's*, I find that the employees' strike was protected concerted activity and did not violate the no-strike clause. For these reasons also, I would find that Respondent violated Section 8(a)(5) and (1) of the Act in unilaterally instituting the shift changes and in rescinding the contract and withdrawing recognition from the Union on August 8, 1971, and Section 8(a)(3) and (1) in terminating the employment of the striking employees because they refused to report to work on August 17, 1971.

Dated, Washington, D.C. June 28, 1974.

JOHN H. FANNING, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
Washington, D.C.

Case Nos. 1-CA-7736
1-CA-7821

THE DOW CHEMICAL COMPANY

and

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC (formerly International Union
of District 50, Allied and Technical Workers
of the United States and Canada)

Case No. 1-CA-7873

THE DOW CHEMICAL COMPANY

and

WILLIAM J. KEITH, An Individual

DECISION

Statement of the Case

JOHN P. von ROHR, Administrative Law Judge: Upon charges filed commencing on June 30, 1971,[1] the General Counsel of the National Labor Relations Board, by the Regional Director for the First Region (Boston, Massachusetts) issued a consolidated complaint on May 8, 1973, against the Dow Chemical Company, herein called

[1] A charge and an amended charge were filed in Case No. 1-CA-7736 on June 30, 1971 and on December 21, 1972, respectively. The charge in Case No. 1-CA-7821 was filed on August 20, 1971 and the charge filed in Case No. 1-CA-7873 was filed on September 17, 1971.

the Respondent or the Company, alleging that it had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, is amended, herein called the Act. The Respondent filed an answer denying the allegations of unlawful conduct alleged in the complaint.

Pursuant to notice, a hearing was held before Administrative Law Judge John P. von Rohr in New London, Connecticut, on July 10, 11, 12 and 13, 1973. Briefs were received from the General Counsel, the Charging Party and the Respondent on September 10, 1973, and they have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is a Delaware corporation with its principal office and place of business located in Midland, Michigan. Although it maintains plants throughout the United States, the only facility involved in this proceeding is its plant located at Allyn's Point, Ledyard Connecticut, where it is engaged in the manufacture of plastics and other chemical products. During the year preceding the hearing herein, this plant shipped products valued in excess of $50,000 to points and places located outside the State of Connecticut. During the same period it received goods and materials valued in excess of $50,000 from points and places located outside the State of Connecticut. Respondent concedes, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

United Steelworkers of America, AFL-CIO-CLC (formerly International Union of District 50, Allied and

Technical Workers of the United States and Canada), is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Events Prior to the Strike Commencing on June 7, 1971*

With but the few exceptions as will be noted, the facts in this case are not in dispute. The only plant involved herein is Respondent's facility located at Allyn's Point, Ledyard, Connecticut, where it is engaged in the manufacture of plastics and related products. The Respondent has recognized the Union as the collective-bargaining agent for the hourly rated (production) employees at this plant since approximately 1954. The effective contract dates of the last of a series of collective-bargaining agreements were from February 23, 1970 to February 26, 1973.

At the times material hereto, the Company employed approximately 145 employees, of whom 19 were employed in the latex department, which is the department where the dispute herein arose. The manufacturing process in this department, described as a basically "batch operation" begins with the introduction of various chemicals into large tanks called reactors. When the chemical process is completed, the liquid is transferred into a distillation unit and is then transferred into a cooling tank. It is then pumped to a holding tank where the latex is tested, filtered and put into storage tanks. Martin Gay, who at all times material hereto was superintendent of this department, described this largely automated process as "basically, loading the kettle, watching the reactions, controlling the addition of ingredients, and then making the transfers down through the process."

Prior to the occasion of the instant dispute, 16 of the 19 employees in the latex department worked a "7 and

2" schedule, i.e., they worked for 7 consecutive days and then had 2 days off. As will be discussed in greater detail below, in about the middle of May 1971, Respondent reached a decision to change this schedule to a regular 5 day workweek i.e., to a "5 and 2" schedule.[2] To accomplish this without laying off any of the employees, this change would involve the adding of an additional reactor cooler operator to each shift, the reduction of head operators from 4 to 3, reduction of drummer filter operators and latex testers from 4 to 3, respectively, and the adding of one handyman, all of which is illustrated as follows:

	7 & 2 Shift		5 and 2 Shift	
Job Classification	No. per Shift	Total	No. per Shift	Total
Head Operator	1	4	1	3
Reactor Cooler Operator	1	4	2	6
Drummer Filter Operator	1	4	1	3
Latex Tester	1	4	1	3
Handyman		2		3
Utilityman		1		1
		19		19

Concerning the changes reflected above, the only employee who would suffer a reduction in his hourly rate would be the least senior head operator whose position would be eliminated and who would be transferred to a reactor cooler operator position at a rate of 18 cents per

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[2] Although the reason for the change is perhaps immaterial, I have no doubt that it was premised on valid economic and business considerations. Thus, at the time of the decision the Company advised the Union that the reason for the change was to save on utility costs. Gay testified that the saving in electricity (which is used to produce steam) would approximate $800 to $1,000 per month. In addition, Gay testified that the Company had lost one of its large customers and that its sales of latex had dropped off 8 to 9 percent from the preceding year.

hour less than his eliminated position.[3] Further, because of the reduction in hours worked and the elimination of overtime, weekend and holiday premiums, Gay estimated that the other employees would earn approximately $570 less per year then they would on the 7 and 2 schedule. However, and as will be further discussed below, none of these changes actually were effectuated because of the strike which commenced just prior to the opening shift on the morning of June 7, 1971, at which point the 5 to 2 schedule was to have been put into effect.

The first word to the employees concerning the above-noted schedule change took place in early May 1971 at which time Superintendent Gay discussed it with the four head operators. This came to the attention of the Union steward in the department, Ronald Caron, and thereafter Caron attended a series of meetings held between Gay and all the latex department employees. In these meetings various mechanics of the proposed change were discussed.

On May 21, William Sawickey, President of the Local Union, received a copy of a notice addressed to the "Latex Plant Personnel," dated May 20, 1971, and signed by Superintendent Gay, which announced that effective on Monday, May 31, the latex department would commence operating on a 5 and 2 shift schedule.[4] On the afternoon of May 21, Sawickey had a meeting with Gay and several other Company officials. Sawickey testified without contradiction that when he took the position that the matter was subject to negotiations, Personnel Manager James Johnson replied, "that he would be willing to dis-

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[3] According to the unrefuted testimony of Gay, the employee to be so affected would be Stanley Angleoszek, whose rate of pay as head operator at $3.82 would have dropped to $3.64 as reactor cooler operator.

[4] Although the notice was dated May 20, the record is not clear as to whether it was posted on May 20 or May 21.

cuss it, but as far as negotiating, no." Sawickey thereupon invoked the grievance procedure[5], and the Step 1 and 2 formalities were completed, with Respondent denying the grievance. After the meeting Sawickey called Francis McDermott, the Union's International Representative who serviced the area, and apprized him of the situation. McDermott promptly sent a telegram to Respondent stating that "any change made in the shift schedules, as threatened, will be considered a violation of the agreement."

A meeting was held on Saturday, May 22, under Step 3 of the grievance procedure. In addition to the Local Union officials, McDermott was also present at this meeting and the record is clear that from this point forward he acted as the principal spokesman and negotiator for the Union. McDermott voiced various objections to the schedule change, including the effects it would have upon the employees, and charged that the announced change would be a breach of the contract. With no agreement being reached, the parties met again in a continuation of the Step 3 meeting on the following Saturday, May 29. As a result of this meeting, and while no basic agreement was reached, the Respondent postponed the previously announced effective date of the change (May 31) to Monday, June 7. The parties also agreed to meet again on June 3 for the purpose of holding a Step 4 grievance meeting. On June 1 the Company submitted a written denial of the Step 3 grievance. It is noteworthy that the following statement contained in this document expresses, in essence, the position which Respondent had taken all along with respect to the matter:

> This change in shift schedule is for economical reasons and the Company Committee does not agree that going from a 7-2 shift schedule to a 5-2 shift sched-

[5] Sawickey testified, "So at that time I found it fruitless to discuss the matter any longer, so I started the grievance procedure."

ule must be negotiated but certainly are willing to discuss the mechanics of getting there.

The June 3 meeting, with all the parties present, was attended for the first time by Frank Bartolomeo, the plant manager, who acted as principal Company spokesman. A lengthy and argumentive discussion ensued, but no agreement was reached. The meeting ended with Bartolomeo stating that he would give the Union his answer on the following day. This he did by telephoning McDermott the next morning to advise him that, for reasons stated, Respondent would adhere to its plan for changing the schedule on June 7.[6]

Somewhat later on June 7 McDermott was approaching the plant in his car to see about another matter when he was hailed by Plant Industrial Relations Manager James Johnson. Johnson advised that Frank Neering, Industrial Relations Manager of Respondent's Midland Division, wished to speak to him. McDermott thereupon accompanied Johnson to the office and a short while later there ensued a three-way telephone conversation between McDermott Johnson and Neering, the latter having been called in Michigan. The upshot of this conversation was that although McDermott again protested the forthcoming schedule change in the latex department, Neering let it be known that he would uphold the decision of the local (Allyn's Point) management and that he would not interfere with the scheduled implementation of the change.

B. *The Strike of June 7, 1971 and Ensuing Events*

International Representative McDermott met with local Union President Sawickey late in the evening of June 6, 1971. Sawickey testified that at this time McDermott

[6] Thereafter, on about June 17, Bartolomeo submitted a written answer to the Union which set forth in detail Respondent's reasons for denying the grievance.

informed him they would meet with the employees at about 8 a.m. the following morning, a Monday. Arriving at the plant at about 7 a.m. on June 6, Sawickey advised the men who were reporting to work that a special meeting, called by McDermott, would be held just outside the plant. At about the same time the men at work in the plant on the late shift were notified of this meeting by a union steward, whom Sawickey had called earlier. Leaving the plant, these men joined the others and a meeting, with approximately 100 employees in attendance, was conducted by McDermott starting at about 8 a.m. McDermott related what had taken place at the grievance meetings with the Company representatives. A short while later Johnson came out to address the employees and give the Company's point of view. McDermott testified that after Johnson departed "the whole thing erupted," with the employees shouting that they were not going to work. He finally turned to Sawickey, he said, and stated, "Okay, Bill, that's the way the men are. We'll go down and notify the Company that the men don't want to go to work." The men did not return to work that day.[7] The following day, June 8, the employees picketed with signs bearing the legend "Dow unfair to its union employees, members of Local 13744 on unfair labor strike." The picketing, with never any change of the legend on the signs, continued until about April 1972.

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[7] Without any personal reflection intended, McDermott clearly demonstrated on the witness stand by his entire demeanor as well as by his lengthly and emotionally charged responses to many of the questions put to him, that he is by nature a fiery, agressive, determined and explosive-type individual. I am constrained to give little weight to his assertion that he advised the assembled employees not so strike but to return to work. This case does not involve a spontaneous walkout or work stoppage. It was McDermott's decision to assemble the men in the first instance and I find it hard to believe, any lip service notwithstanding, that McDermott did not have enough influence among the men to have them do his bidding.

As to be expected, in the first days of the strike Respondent, by written and oral communications with various International and Local Union representatives, protested that the strike was in violation of the contract. In response to a telephone call from Industrial Relations Director Neering, Marlin Brennan, a vice president of the International, sent a letter to Neering dated June 7, 1971, advising that he had contacted Union Regional Director Earl Colandro and the President of the Local Union and "instructed them to order the membership back to work and process the grievance through the grievance procedure provided in the existing contract between Dow Chemical Company and District 50." [8] The record is clear, however, that the International Union in fact did not at any time during the strike direct or urge the men to return to work.

On June 11, Bartolomeo met with Union Vice-President Colandro at the Connecticut Yankee Motor Inn. Although nothing was resolved at this meeting, the Charging Party introduced a deposition of Colandro, who is now deceased, the significant part of which appropriately warrant comment here and in which he stated as follows:

> We talked about the issue at hand, but the remarks that Mr. Bartolomeo made at that time were that he was more interested in getting rid of International Representatives of the union and Local union than he was in settling the dispute. Our meeting at the Connecticut Motor Inn served about as much purpose—actually served no purpose at all to this situa-

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[8] Brennan testified that he was unable to contact Colandro after talking to Brennan, and that hence he sent the "routine" letter discussed above. Testifying also that at the time he was unfamiliar with the particular contract with Respondent's Allyn's Point Plant, he said that about 2 days later he spoke to Colandro who told him "we have the right to strike under the provisions of that contract."

> tion. We tried to resolve it. We told him we would go even into arbitration with the thing but he refused on every angle and every approach that we made on it.

Plant Manager Bartolomeo, called on rebuttal, denied making any remarks to the effect that he was more interested in getting rid of union officials than he was in settling the strike. Bartolomeo impressed me as an honest and forthright witness and I credit his testimony that he did not make any statement such as that attributed to him by Colandro in the above deposition. Moreover, I hardly think that Bartolomeo, with his experience and apparent intelligence, would have been so naive or foolish as to make any such union-baiting remark to a vice president of the International Union. Indeed, it is noteworthy that aside from Colandro's foregoing testimony, which I do not credit, there is no evidence in the entire record of any union animus on behalf of the Respondent.

Returning to the chronology of facts, on June 11 Bartolomeo also sent a letter to the employees and the Union committee, in which he stated, *inter alia*, that "illegal acts of violence and continued participation in the strike could subject you legal remedies, disciplinary action and even discharge." Asking the employees to discontinue the "unlawful strike" the letter further stated:

> I sincerely feel that the resolution to the problem lies in the grievance and arbitration procedure and ask you to encourage your Union leadership to return to the legal and in my opinion right means of solving this problem.

Letters of similar content were sent to the employees by Bartolomeo on June 17 and July 13. By letter of July 23, Bartolomeo notified the employees that Re-

spondent would commence hiring replacements on July 29, stating also that requests for reinstatement would be considered "as long as job opportunities remain," but that employees might be "delayed or prevented," from returning to work because of their "participation in unlawful activities pertaining to the strike."

In the meantime, on June 10, Union and Company representatives held an unsuccessful meeting with State mediation officials, in an attempt to resolve the dispute. On July 26 Respondent sent a letter to the Labor Commissioner of Connecticut advising him of its willingness "to submit the labor dispute resulting in said strike or walkout to arbitration or mediation." A further meeting was held with a State mediation official, who met with the parties separately, in about the first week of August. However, this meeting also was of no avail.

C. *The Cancellation of the Contract; The Termination of Employees; Withdrawal of Recognition*

It is undisputed that Respondent rescinded the collective-bargaining agreement by letter, dated August 9, 1971. This letter which was signed by Bartolomeo and sent to Local and International Union officials, stated as follows:

> This is to notify you that because of the breach of the Collective Bargaining Agreement between the Allyn's Point Plant of the Dow Chemical Company and the Union which had as its effective date 2/23/70, we hereby cancel the Agreement.

On August 12, Bartolomeo sent a letter to the striking employees which stated as follows:

> We are currently in the tenth week of the strike which commenced on June 7, 1971. As you know I have predominately relied on these letters to keep

you informed of what I consider the true facts regarding the strike, its issues and its consequences.

It has been a month since I discussed with you my need to evaluate the long-term operation of the Allyn's Point Plant. In the meantime some employees have been returned to work and we have hired a number of new permanent employees. I must continue to take further positive action in restoring the plant to standard operating conditions by assuring the availability of employees willing to work.

Tuesday, August 17, 1971, at 4:00 p.m. will be the last day that request for reinstatement will be accepted. Requests for reinstatement should be made by personally coming to the Personnel Office of the plant and then, if accepted, report in ready to work when scheduled. Your request will be individually considered.

In considering your decision you should be aware that disciplinary action is being taken as to all employees involved in this illegal strike. This action could be written reprimands, suspension or refusal to reinstate.

Respondent terminated the striking employees at 4 p.m. on August 17. Bartolomeo's letter of August 18 to the striking employees notifying them of this action stated in pertinent part as follows:

During the past ten weeks I have furnished you information about your status as a striker involved in the illegal and unprotected strike at the Allyn's Point Plant.

By letters of June 11th and 17th, July 13th and 23rd, and August 12, 1971, I explained the Company's position concerning the strike and suggested

that you consider requesting reinstatement. The August 13th letter stated that your request for reinstatement had to be received by the Company no later than 4:00 p.m. on August 17, 1971 to be considered.

You failed to respond and did not request reinstatement by that time and date. By your involvement in the illegal and unprotected strike you forfeited any rights as an employee. The Company has accordingly terminated your employment. As of 4:00 p.m., August 17, 1971 your name was removed from the employee personnel list and you are no longer an employee of the Dow Chemical Company.

On or about August 26, Bartolomeo received a petition signed by 55 hourly employees which in pertinent part stated, "We do not want or need the International Union of District 50, Local #13744 at our plant." It is undisputed that the 55 employees who signed this petition constituted a substantial majority of the employees who were working for the Respondent at this time. There is no evidence, nor is there any contention, that Respondent in any way sponsored, encouraged or gave assistance in the circulation of this petition.

On August 28, Bartolomeo sent a letter to the Local President and International Representative stating that the Company had "reason to believe "that the Union no longer represented a majority of the employees and advising that "because of the lack of majority status and contract termination . . . the Company no longer recognizes the Union as bargaining agent for our hourly rated employees at the Allyn's Point Plant." Respondent has not recognized the Union since this communication.

D. *Additional Facts; Conclusions*

1. The Variance in Contentions Between the General Counsel and the Charging Party

In discussing my conclusions in this case, I should first note that in large part the General Counsel has proceeded on a substantially different theory than that urged by the Charging Party. To put it briefly, both parties urge, as the complaint alleges, that on or about May 20, 1971, Respondent unilaterally announced the change in the operating schedule, as previously discussed herein, and that thereafter it refused to bargain over the matter, all in violation of Section 8(a)(1) and (5) of the Act. Here the positions change. Apart from a factual issue as to whether the Union complied with the grievance procedure of the contract before going out on strike, the Union, relying upon the principle set forth in *Mastro Plastic Corp. v. N.L.R.B.*, 350 U.S. 270, contends that the strike was caused by the Respondent's unfair labor practices and that hence, without anything further, Respondent's termination of the striking employees, its cancellation of the contract and its withdrawal of recognition was in violation of Section 8(a)(1), (3) and (5) of the Act. The General Counsel, on the other hand, does not contend that the strike was an unfair labor practice strike *ab initio*. Thus, at the hearing, and more specifically in his brief, the General Counsel stated his position as follows: "General Counsel takes the position that the unilateralism engaged in by Respondent, even though an unfair labor practice, was not so serious so as to label the strike at is inception on June 7 a protected strike if, as alleged by Respondent, said employees went out on strike in violation of the contract's no-strike clause." Parenthetically, it may be noted that although the latter part of the General Counsel's statement reflects an obviously hedged position, it is interesting that the General Counsel does not in fact urge that

Respondent's defense, to which he alludes, is lacking in merit. However, proceeding on a different theory, the General Counsel does contend that the strike beginning on June 7, 1971, was subsequently converted into an unfair labor practice strike, particularly by reason of Respondent's cancellation of the contract, hence that the termination of the striking employees, its rescission of the contract and its withdrawal of recognition were all in violation of Section 8(a)(1), (3) and (5) of the Act.

2. Unilateral Action in Changing the Work Schedule in the Latex Department

Admitting that it would not negotiate with the Union concerning its decision to change the shift schedule in the latex department from a 7-2 workweek to a 5-2 workweek, Respondent contends that it had a right to do so under the terms of the then effective collective-bargaining agreement. Thus, Respondent relies on two of the contract provisions, the first of these being the management rights clause (Article II, Section 2.1) which in pertinent part provides that the Company shall have the right "to hire, promote, or demote . . . employees for due cause or lack of work or for other legitimate reasons . . ." and that "other rights and responsibilities belonging solely to the Company [include] . . . schedules of production and processes of manufacturing. . . ."

Respondent also points to Article 14, Section 4.1, entitled "Hours of Work," the pertinent provisions of which are as follows:

> (g) A 7 and 2 shift employee will follow the standard shift (1, 2, 3, 4) work schedule. An individual's shift schedule and scheduled days off may be changed as a result of: posting; bumping; balancing the experience and training of personnel; personnel problems; loanout; training period; temporary job; waiver—if requested and approved.

(h) A 5 and 2 shift schedule using three employees in rotation has been established for 24 hours per day, five days a week for work coverage where one or more men per shift is required in a classification.

(i) The provisions of this section may be modified only by mutual agreement of the Company and Union Committees.

I am persuaded that none of the above contract provisions, either explicitly or implicitly, authorizes the Respondent to unilaterally change the work schedule of the employees from a 7-2 workweek to a 5-2 workweek in the manner and to the extent contemplated by the change which was to become effective on June 7, 1971.[9] Thus, I think it clear that the right to "schedule production" does not authorize the unilateral changing of hours or days of work. In fact, the hours of work are specifically governed by Article IV of the contract, the last clause of which provides that any changes in that section may be modified only by mutual agreement of the parties. Further, it is noteworthy that although Section (g) of Article 14 specifies that the schedule of an individual 7 and 2 shift employee may be changed under certain conditions, it appears clear that Respondent's announced change was not predicated upon any of the specific conditions set forth therein. Accordingly, and because I find that Respondent's unilateral decision to change from a 5-2 work schedule from a 7-2 work schedule was not sanctioned by the contract,[10] I find and conclude that

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[9] I reject Respondent's contention that no unfair labor practice involving unilateral action can be found because the announced change was never implemented. Insofar as the issues in this case are concerned, the change in the work schedule was to all practical effect accomplished.

[10] The waiver by a union of its statutory right to be consulted concerning wages, hours, and terms and conditions of employment

Respondent's unilateral announcement and scheduling of this change violated Section 8(a)(5) and (1) of the Act.[11] See *Long Lake Lumber Company*, 160 NLRB 1475; *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506.

In addition, the complaint alleges that Respondent's announcement of the work schedule change in the latex department, as discussed above, constituted a modification of the contract terms without complying with the requirements of Section 8(d) of the Act. However, the Board has held that "the breadth of Section 8(d) is not such as to make any default in a contract obligation an unfair labor practice, for that section, to the extent relevant here, is in terms confined to the 'modification' or 'termination' of a contract." *C & S Industries, Inc.*, 158 NLRB 454. Indeed, although I have held that the contract did not *authorize* the Respondent unilaterally to take the action in question, it does not necessarily follow that this conduct also constituted a breach or substantial

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must be clear and unmistakable. *The Timken Roller Bearing Co. v. N.L.R.B.*, 325 F.2d 746 (C.A. 6), cert. denied 376 U.S. 971.

Moreover, and having considered all the evidence pertaining to the [history of bargaining,] I am satisfied that the evidence does not establish that the Union intended to grant Respondent the right to unilaterally change the 7-2 work schedule in the latex department.

[11] Cf. *Jos. Schlitz Brewing Company*, 715 NLRB 141, wherein the Board refused to exercise jurisdiction on the ground that the case should be left for arbitration under the contract's grievance and arbitration procedure, since the arbitral interpretation would resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act. While it is arguable here that Respondent here also acted under color of a right, Respondent does not urge that the Board should defer the matter to arbitration. Accordingly, under *MacDonald Engineering Co.*, 202 NLRB No. 113, I must conclude that the record evidence before me is insufficient for a finding that deferral is warranted. See also *Medco Construction Corp.*, 206 NLRB No. 17.

modification of the contract.[12] In any event, and upon the entire record in this case, I am persuaded that Respondent's unilateral action here was not of such scope as to constitute a "modification" of the contract within the meaning of Section 8(d). Accordingly, it is recommended that this allegation be dismissed.

3. *The Union's Contentions*

The Union first of all contends that the strike action taken on June 7, 1971, did not breach the collective-bargaining agreement and therefore was a protected strike from the outset. I find this contention to be without merit.

Article VII, Section 7.7 of the then effective contract contains a no-strike, no-lockout provision which in pertinent part provides that the Union may not engage in a strike unless and until "all of the Bargaining and Grievance Procedure outlined in this agreement [Steps 1 through 5] have been exhausted," the Union or the Company has made a written request for arbitration after receipt of the Step 5 answer, *and* arbitration has either been completed or refused.

It is undisputed that the parties completed and complied with the first four steps of the grievance procedure.[13] Step 5 thereof provides as follows:

> Step 5. Should a satisfactory solution not be arrived at in Step 4, the Union chairman of the grievance committee shall so notify the Plant Manager, or appointee, in writing and within ten days the

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[12] Thus, it might well be argued that contract is either silent or ambiguous with respect to the particular subject here at issue.

[13] It will be recalled that the Step 4 meeting was held on June 4, that Bartolomeo orally notified McDermott of Respondent's decision on June 5, and that a written answer was provided to the Union on June 17,

> Company shall arrange for the unresolved case to be reviewed by the Midland Division Manager in charge of the Allyn's Point Plant of his appointees.

The Union contends in its brief that "the telephone conversation initiated by Neering on June 4 satisfied all the essential requirements of a Step 5 meeting. . . ." In rejecting this contention as without merit, the short answer to this is that the unequivocal requirements set forth in the above-quoted provision were obviously not complied with. Thus, not only is it undisputed that there was no written request to proceed with Step 5, but Respondent submitted uncontested evidence showing that it had been the practice of the parties to always adhere to this requirement.[14] Nor can I accept the Union's contention that the requirement of a written request was waived because Neering initiated the telephone conversation with McDermott on June 4. I find nothing in this act or the discussion which followed to warrant the conclusion that that Respondent either directly or inferentially gave any indication of waiving this requirement. Indeed, Neering credibly testified that during this telephone conversation he advised McDermott, *inter alia*, "not to do anything foolish, follow the grievance procedure." Finally, and with further respect to Respondent's contention, it is undisputed that there was no review of the grievance by the Midland Division Manager in charge of the Allyn's Point Plant, or his appointee, as provided in the Step 5 provision. Thus, not only is there no evidence to establish that Harold Bosscher, then the Midland manager, ever appointed or authorized Neering to act in his behalf in the matter, but the record establishes, as the Union

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[14] Except in four instances where records were unavailable, the records reflect that there was a written request to proceed to Step 5 in every grievance processed to this step under the 1966 and 1970 collective-bargaining agreements. During this period there were a total of 36 such written requests to proceed to Step 5.

undoubtedly knew, that W. Fletcher had acted as Bosscher's appointee (also known as the appealsman) in the preceding 18 consecutive grievances that were brought through Step 5.[15]

I also reject, as unsupported by the evidence, the Union's further contention that arbitration was requested by the Union and refused by the Respondent. In the first place, this contention may be put to rest merely by noting that the contract does not even contemplate arbitration until such time as the Fifth Step of the grievance procedure has been utilized and completed, which I have found it was not. However, assuming *arguendo* that there was compliance with Step 5, it is undisputed that at no time was there fulfillment of the remaining contractual prerequisites to the right to strike, namely, a request "in writing, within 30 days to proceed to arbitration" and a refusal by the Company to agree to arbitration.[16]

Finally, the Union contends that the June 7 strike was protected under the doctrine of the *Mastro Plastics* case, *supra*. In *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802, and for reasons fully explicated therein, the Board rejected a rigid interpretation of *Mastro Plastics* and adopted the rule that "only strikes in protest against *serious* unfair labor practices should be held immune from general no-strike clauses." See also *Atlantic*

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[15] Joint Exhibit F.

[16] A transcript of the Step 4 grievance meeting on June 3 reflects that during this lengthy meeting McDermott at one point did make spontaneous reference to the possibility of taking the matter to arbitration. McDermott also testified, but Neering denied, that he (McDermott) also proposed arbitration during his telephone conversation with Neering on June 4. Whatever McDermott may have orally and spontaneously proposed during either discussion, I think it clear that any such reference to arbitration related solely to *immediate* arbitration, and in any event, could not possibly be construed as complying with the specific requirements of the contract's grievance and arbitration procedure.

Richfield Company, 119 NLRB No. 135 for a further application of this rule.

Upon the facts in this case, I find and conclude that Respondent's unilateral conduct, although found to be an unfair labor practice, was not of such serious nature as to be "destructive of the foundation of which collective bargaining must rest." [17] Indeed, as heretofore indicated, there is no evidence that Respondent held any union animous, the parties appear to have long enjoyed a harmonious relationship, and there is no evidence to indicate that Respondent wished "to rid itself of the Union." Moreover, here, as in *Arlan's Department Store* and *Atlantic Richfield, supra*, the contract grievance procedure was available for the peaceful resolution of the dispute. The Union having failed to submit the dispute in accordance with these provisions of the contract, I can but conclude and find that the strike beginning on June 7, 1971, was unprotected from its inception.

4. The Alleged Unlawful Rescission of the Contract

The General Counsel contends, and the complaint alleges, that Respondent's cancellation of the contract on August 9, 1971, was violative of Section 8(a)(5) and (1) of the Act. Respondent defends on the ground that this action was justified because the Union breached the contract by engaging in a strike which was proscribed by the no-strike clause. In support of its position, Respondent largely relies on *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 involving a situation where, as here, the Union engaged in a strike contrary to the provisions of a no-strike clause contained in the contract. In finding that the employer's subsequent cancellation of the collective-bargaining agreement was not an unfair labor practice, the Board stated, "We find that the Respondent's

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[17] *Mastro Plastic Corp., supra.*

unilateral cancellation of its contract with UE did not constitute a violation of Section 8(a)(5) and (1) of the Act, but was justified by UE's prior breach of the contract." [18]

The General Counsel, on the other hand, relies principally on certain dicta by the Court in *N.L.R.B. v. State Electric Service, Inc.*, —— F.2d —— (C.A. 5), 82 LRRM 3154 [19] wherein the Court stated that a union's breach of a no strike clause in not "automatically" sufficient to breach the entire contract.

I find the General Counsel's reliance upon *State Electric* to be misplaced because the facts in that case differ significantly from those in *Marathon Electric* as well as from those in the case at bar. Thus, when the Board decided that the employer's cancellation of the contract in *State Electric* was not justified, it based this finding upon the factual grounds that (1) the no-strike clause in question was a limited one and the union's work stoppage was not in violation of it; and (2) "the strike occurred as a result of the [employer's] failure to respond to the Union's request for recourse to the contractual

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[18] In enforcing the *Marathon* case, *supra*, the Court in *United Electrical Workers v. N.L.R.B.*, 223 F.2d 338, 341 (C.A.D.C.), cert. denied 350 U.S. 981, stated:

> It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. Moreover, in cases where the breach is a strike in violation of a collective bargaining agreement, as in the instant case, application of the rule is supported by the rationale underlying such agreements. The prevention of strikes is one of the principal purposes of labor contracts and of the Act. A no-strike provision is 'the chief advantage which an employer can reasonably expect from a collective labor agreement.' The walkout was a material breach which justified the subsequent rescission of the contract by the company.

[19] Enforcing *State Electric Service, Inc.*, 198 NLRB No. 77.

procedure," and that even thereafter "the Union continued to abide by the contract by submitting the charge of the Company's failure to abide by the contract to the dispute settlement procedure of the contract . . . ." Neither of these circumstances are present in *Marathon Electric* or in the instant case. Indeed, as has been previously found, this is a case where the Union, not the Respondent, failed to comply with the grievance procedure. Furthermore, insofar as *State Electric* is concerned, the Board in that decision gave no indication whatsoever that it intended to repudiate or modify the rule in *Marathon Electric, supra;* it appears simply to have declined application of that rule in the absence of a clear breach of contract by the Union.

For the reasons stated above, I believe the rule expressed by the Board in *Marathon Electric, supra,* which it recently affirmed in *Kellstone, Inc.*, 206 NLRB No. 27, to be applicable and controlling to the issue presented here.[20] Accordingly, I find that Respondent, by reason of the Union's breach of the no-strike provision in the contract, did not violate Section 8(a)(5) and (1) when it rescinded the contract.[21] Accordingly, it is recommended that this allegation of the complaint be dismissed.

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[20] I find the additional cases cited by the General Counsel and the Charging Party, all of which I have considered, to be factually distinguishable and not decisive of the issue here.

[21] Pointing out that Respondent's letter to the Union of August 9, 1971, cited only "breach of the collective bargaining agreement" as its reason for cancelling the contract, the General Counsel and the Charging Party urge that no weight should be given to certain additional reasons, advanced and testified to by Plant Manager Bartolomeo, for taking this action. The additional reasons thus given by Bartolomeo include the following: (1) complaints he received from job applicants to the effect that they had been stopped, harassed and threatened when coming through the picket line for job interviews; (2) complaints from replacements hired after the strike that they were threatened with fines because they

5. The Termination of the Strikers Withdrawal of Recognition

Proceeding on the theory that the strike was converted into an unfair labor practice strike by Respondent's rescission of the contract on August 9, 1971, the General Counsel alleges that the striking employees thereby became unfair labor practice strikers and that hence their termination by Respondent on August 18, 1971, was violative of Section 8(a)(3) and (1) of the Act. However, having found adversely to the General Counsel on the matter of the cancellation of the contract, it follows, and I find, that the strike was not thereby converted into an unfair labor practice strike. I also am unpersuaded by the General Counsel's further academic argument, as stated in his brief, that ". . . Respondent cannot have his cake and eat it, too. After cancelling the contract, Respondent cannot thereafter justify the discharge of striking employees by its reliance on the cancelled contract." The short answer to this is that whatever were Respondent's rights to discharge the strikers,

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had violated union rules, that they would have to join the Union because of the union shop clause in the contract, as well as complaints from some of the employees who returned to work that charges had been filed against them threatening them with fines, and (3) the fact that the Company regarded its legal position to be buttressed by the Regional Director's dismissal, on August 6, 1971, of a refusal to bargain unfair labor practice charge which had been earlier filed by the Union.

While the record does not permit a ruling on the merits of each of the aforesaid factual assertions by Bartolomeo, I have no doubt but these were matters which Bartolomeo in fact did take into consideration in finally reaching a decision to cancel the contract. However, since it is plain that Respondent's basic reason for taking this action was the Union's breach of contract, I think it clear that the addition reasons go more toward explaining the particular timing of this action. It seems to me that if an employer is justified in cancelling the contract in the first instance, surely it does not waive this right by deferring this action until such time as it has additional grounds therefor.

these did not derive from the contract, but rather involve the question as to whether or not the action taken, under all of the circumstances of this case, was prohibited or permissive under the Act.

In sum, I must conclude, as the Board put it in *The Kroger Co. (Cleveland Div.)*[22] that ". . . the striking employees forfeited any rights they may have had to reinstatement by participating in the strike in violation of the no-strike provision of the . . . contract then in effect." Accordingly, it is found that Respondent did not violate Section 8(a)(3) and (1) of the Act by its termination of the striking employees.[23]

I also find that Respondent did not, as the complaint alleges, violate Section 8(a)(5) of the Act by withdrawing its recognition of the Union on August 28, 1971. This conclusion must follow in consequence of the aforenoted finding that Respondent validly terminated the strikers on August 18.[24] The strikers no longer enjoying the status of employees. Respondent was entitled to rely on the heretofore described petition on about August 26, 1971, signed by a majority of the employees then

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[22] 177 NLRB 769.

[23] See also *United Furniture Workers of America, AFL-CIO, Local 270 v. N.L.R.B.*, 336 F.2d 738 (C.A.D.C.), cert. denied, 379 U.S. 838; *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.*, 217 F.2d 366, 369 (C.A. 9).

Furthermore, assuming *arguendo* that Respondent's rescission of the contract was an unfair labor practice, the General Counsel has not established that the cancellation of the contract in fact led to a prolongation of the strike. Thus, it is undisputed that there was never any change in the language on the pickets signs, in addition to which there is no evidence whatsoever to indicate any overt manifestation by the Union of any change in the initial objective of the strike after the rescission of the contract.

[24] *Marathon Electric Mfg. Corp. supra; United Furniture Workers of America, Local 270 v. N.L.R.B., supra.*

employed by Respondent that they did not wish the Union to represent them.

Finally, the complaint alleges that Respondent violated Section 8(a)(1) of the Act in that its letter to the striking employees of August 12, 1971, which has been previously set forth in full herein, unlawfully "threatened to permanently replace them if they did not abandon the strike" and unlawfully "threatened them with disciplinary action when they abandoned the strike and returned to work." I find this allegation to be without merit. Suffice it to say that inasmuch as the employees were engaged in an unprotected strike, it seems clear that Respondent was within its rights in advising them which of its legal prerogatives it might exercise against them if they continued in this activity. I shall, accordingly, recommend that this allegation also be dismissed.[25]

The Remedy

I have heretofore concluded and found that Respondent engaged in unlawful conduct by unilaterally determining and announcing a change in the work schedule of employees in the latex department. While normally I would recommend an order requiring Respondent to cease and desist from this conduct, to take certain affirmative action, and to post appropriate notices, I am persuaded that under the peculiar circumstances of this case no such

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[25] I also reject as without merit the Union's contention that Respondent "condoned any strike behavior by offering the [strikers] reinstatement after August 9." Suffice it to note that in its letters from June 11 through August 12, 1971, even though directly or indirectly appealing to the employees to abandon the strike and return to work, Respondent consistently indicated that it reserved the right to take whatever action against them it deemed necessary or appropriate. Clearly, Respondent did not thereby demonstrate a "willingness to forgive the improper aspects of concerted activity, to wipe the slate clean." *Confectionery and Tobacco Drivers, Local 805 v. N.L.R.B.*, 312 F.2d 108, 112-113 (C.A. 2).

order is warranted or necessary. My reasons for this are threefold, namely (1) Since the employees in the appropriate unit are no longer represented by the Union or by any other labor organization, it obviously is no longer possible to order Respondent to bargain affirmatively with any bargaining representative of the employees; (2) Inasmuch as Respondent did not in fact implement the announced change in the work schedule, there is no *status quo ante* to be restored; and (3) Without relying on this reason alone, I think some consideration should be given to the fact that Respondent was agreeable to, and in fact did, consult with the Union concerning the mechanics of putting the 5-2 work schedule into effect, in addition to which it partially complied with the Union's request that the matter be deferred by postponing the effective date of the announced change for 1 week. Clearly, this would seem a far cry from any "complete rejection of the bargaining principle."

ORDER [26]

The complaint is dismissed in its entirety.

Dated at Washington, D.C.

/s/ John P. von Rohr
JOHN P. VON ROHR
Administrative Law Judge

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[26] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-1015

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

DOW CHEMICAL COMPANY AND NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 24, 1981.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 12th day of June, 1981.

Office-Supreme Court, U.S.
FILED
AUG 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

v. *Petitioner*,

THE DOW CHEMICAL COMPANY,

AND

NATIONAL LABOR RELATIONS BOARD.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE DOW CHEMICAL COMPANY IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded, on the facts of this case, that the Union materially breached the collective bargaining agreement when it struck the Company over a dispute hinging entirely on contract interpretation and fully susceptible to resolution through available grievance and arbitration procedures which the Union had failed to exhaust.

2. Whether the court of appeals, having found on the facts that the Union had materially breached the collective bargaining agreement, properly determined, as did the Labor Board in its initial decision, that the Company was entitled to resort to traditionally-approved economic measures in response, including cancellation of the breached agreement.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	(i)
OPINIONS BELOW	2
COUNTERSTATEMENT OF THE CASE	2
A. The Facts	2
B. Proceedings Below	4
REASONS FOR DENYING THE WRIT	8
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Arlan's Dept. Store of Michigan, Inc., 133 N.L.R.B. 802 (1961) 5, 10, 11, 13, 14
Atlantic Richfield Co., 199 N.L.R.B. 1224 (1972) .. 10
Boeing Airplane Co. v. Aeronautical Industries Lodge No. 751, Int'l Ass'n of Machinists, 188 F.2d 356 (9th Cir. 1951), *cert. denied*, 342 U.S. 821, *aff'g* 91 F. Supp. 596 (W.D. Wash. 1950) 16
Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) 16
Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397 (1976) 16
Children's Rehabilitation Center, Inc. v. Service Employees Int'l Union, Local 227, 503 F.2d 1077 (3d Cir. 1974), *cert. denied*, 419 U.S. 1090 16
Dow Chemical Company v. I.U.E., 82 L.R.R.M. 3169 (M.D. Fla. 1971), *aff'd*, 480 F.2d 433 (5th Cir. 1973), *cert. denied*, 415 U.S. 932 11
Dow Chemical Company v. United Steelworkers etc. and NLRB, 429 U.S. 834 (1976) 2
Drake Bakeries, Inc. v. Bakery & Confectionery Workers, 370 U.S. 254 (1962) 11, 12
Kellstone, Inc., 206 N.L.R.B. 156, *enf'd*, 493 F.2d 1352 (6th Cir. 1974) 16
Marathon Electric Mfg. Co., 106 N.L.R.B. 1171 (1953), *enforced sub nom. United Electrical Radio & Machine Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 .. 7, 8, 13, 14, 15, 16, 17
Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) 10, 11, 12
NLRB v. C & C Plywood, 385 U.S. 421 (1967) 12
NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960) 17
NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322 (1974) 11
NLRB v. Northeast Oklahoma City Mfg. Co., 631 F.2d 669 (10th Cir. 1980) 12, 13, 14, 15, 16

TABLE OF AUTHORITIES—Continued

Page

NLRB v. State Electric Service, Inc., 477 F.2d 749 (5th Cir. 1973), *cert. denied*, 414 U.S. 911 ..... 12, 15, App. 1a, 2a

Pence Construction Co. v. Int'l Union of Operating Engineers, Local 450, 484 F.2d 398 (5th Cir. 1973), *cert. denied*, 414 U.S. 1144, *aff'g* 84 L.R.R.M. 2391 (S.D. Tex. 1972) 11

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 17

United Packinghouse Workers, Local 721 v. Needham Packing Co., 376 U.S. 247 (1964) .....12, App. 1a

Statutes:

National Labor Relations Act of 1935, as amended:

§ 8(a)(3), 29 U.S.C. § 158(a)(3) 13

§ 8(a)(5), 29 U.S.C. § 158(a)(5) 13

§ 8(d), 29 U.S.C. § 158(d) 13

Miscellaneous:

Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1 (1958) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-153

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THE DOW CHEMICAL COMPANY,

AND

NATIONAL LABOR RELATIONS BOARD.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE DOW CHEMICAL COMPANY IN OPPOSITION

The Dow Chemical Company (hereinafter referred to as "the Company") respectfully requests that this Court deny the petition of the United Steelworkers of America, etc. (hereinafter referred to as "the Union" or "the Petitioner") for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

In addition to the opinions below which are cited at page 1 of the Petition for Certiorari, the Order of this Court in *The Dow Chemical Company v. United Steelworkers, etc. and NLRB*, 429 U.S. 834 (1976), which denied a petition for certiorari in this case, also bears upon this proceeding.

COUNTERSTATEMENT OF THE CASE

A. The Facts [1]

The petition contains several inaccuracies and omits certain crucial facts that directly affect the issues upon which certiorari is sought. One fundamental inaccuracy concerns the mischaracterization of the nature and significance of the Company's decision to implement a schedule change in its latex department.

Contrary to the Union's description, the Company did not "without any prior discussion" determine to "carry out a basic restructuring" of the latex department's method of operation. (Pet. Br. 3). Rather, as the factual summary of the court below makes clear (App. 4a), the essence of the Company's decision, and the only aspect of it which was presented to the Union as non-negotiable, was simply that the Company was going to stop running latex production on the weekends.[2] *How* this decision would be imple-

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[1] References to the appendix to the petition for certiorari are cited as "App.", followed by the appropriate page number. References to the joint appendix in the court below are cited as "JA", followed by the appropriate page number.

[2] The petition subtly inflates the impact of the schedule change. Thus, although the Union notes the approximate size of the bargaining unit involved (145 employees), it fails to

mented was left open to negotiation, as management representatives made clear by their repeated statements that they were "willing to discuss the mechanics" of going to a 5-day schedule. (App. 4a; JA 374, 510). And, indeed, Company officials spent at least eight hours at the table with the Union's committee trying to resolve the dispute before the change was slated to take effect. (JA 55, 110, 127, 248).

Important events surrounding the abandonment of the contractual grievance and arbitration procedures have also been omitted from the petition's factual summary. As set out, in relevant part, in the opinion below (App. 5a-6a), Article VII of the contract provides a five-step grievance procedure. Should the dispute not be resolved by the grievance procedure, the contract then provides that the problem may, upon the consent of the Company and Union bargaining committees, be submitted to an arbitrator. (App. 5a). The contract also contains a no-strike clause which unqualifiedly states that the Union and its members will not engage in any strike or work stoppage unless and until there has been a completion and exhaustion of all five steps of the grievance procedure, followed by arbitration of the dispute or rejection by the Company of a timely, written request for arbitration. (App. 6a).

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mention that the Company's decision affected only 16 employees. (App. 4a). Similarly, although the petition recites conflicting testimony on the financial effect of the schedule change on employees, it fails to note that the far more conservative figure of $570 annually was presented by a witness, Superintendent Gay, whose testimony was credited by the Administrative Law Judge. (App. 132a-133a).

Between May 21, 1971, and June 3, 1971, four steps of the grievance procedure were completed. (App. 6a, 135a-137a). Following the Step 4 meeting on June 3,[3] and continuing through the time of the contract cancellation on August 9, 1971, the Union made no attempt to pursue the contract grievance procedure further. No written request for a Step 5 meeting was ever made, and there is no indication in the record of any oral request for such a meeting. (JA 415). No meeting of the Company and Union committees at Step 5 was ever held, as required by the contract, and no written request for arbitration was made during this period. (App. 6a-9a).

B. Proceedings Below

In describing the decision below (*"Dow II"*), the petition asserts that "the court did not purport to disturb the Board's findings that the Company's initial unfair labor practice was 'serious' or that 'the onus for the strike must be placed upon the [Company].'" (Pet. Br. 10). This is a misleading description of the opinion. The *Dow II* opinion, in fact, deprecates both the legal and the factual premises of the Board's supplemental decision.

The Board's initial decision had upheld the Administrative Law Judge's determination that the Company's pre-strike conduct constituted a non-serious

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[3] The petition unaccountably notes two different dates when the Company's schedule changes were supposed to go into effect, May 31, 1971, and June 7, 1971. (Pet. Br. 4). In fact, the Record manifestly shows that the Company postponed implementation of the schedule change for an extra week specifically to allow further discussion. The Union, however, made no counterproposal whatsoever. (JA 475).

unfair labor practice, a legal conclusion that *Dow I* did not overrule and which ultimately established the strike as a material breach of contract under the Board's *Arlan's* rule.[4] When the Board, on remand, reversed itself and declared the same conduct "serious," it purported to turn a strike in breach of contract into protected activity, a conclusion the court in *Dow II did* reject. (App. 18a-19a). The court thereby effectively invalidated the Board's characterization of the Company's conduct as "serious."

The *Dow II* court's recitation of the facts also reflects an implicit rejection of the Board's conclusion placing onus for the strike upon the Company. The court describes repeated efforts of the Company, both before and after the strike, to convince the Union to pursue the grievance and arbitration procedures to completion. (App. 4a-11a). Among such efforts, the court's recitation includes the following:

(a) "[T]he Union was notified of the proposed change. . . . Dow's personnel manager indicated that . . . he was willing to discuss implementation of the change. . . . (App. 4a).

(b) "[T]he parties completed the first four steps of the grievance procedures. . . . At [the Step 4] meeting a union representative orally suggested immediate arbitration, and the company responded by urging the Union to pursue the contract grievance machinery." (App. 6a).

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[4] *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802 (1961).

(c) "On June 11, [the plant manager] wrote to the employees, advising them . . . 'that the resolution to the problem lies in the grievance and arbitration procedure and [I] ask you to encourage your Union leadership to return to the legal and in my opinion morally right means of solving this problem.'" (App. 7a).

(d) "Meanwhile [the Company] requested the assistance of the Connecticut state mediation service, and, on July 26, 1971, advised the State Labor Commissioner that it was willing to submit the labor dispute resulting in the strike to arbitration or mediation. The Union was made aware of Dow's willingness to arbitrate or mediate. . . ." (App. 7a-8a).

(e) "Despite notice of Dow's willingness to arbitrate even after expiration of the time limits specified in the contract, the Union continued the strike." (App. 8a).

Nothing in the *Dow II* opinion suggests that the court of appeals agreed that the Company's pre- or post-strike conduct warranted opprobrium. Thus, while the *Dow II* opinion perhaps does not explicitly reject the Board's accusation of "serious" wrongdoing by the Company, a fair reading of the court's opinion is entirely antithetical to such a finding.

Since the court of appeals did *not* uphold the Board's finding that the Company engaged in a "serious" unfair labor practice, the principal issue which the Union seeks to raise is not genuinely presented by this case. The legal consequences of a "serious" unfair labor practice committed by an employer were

not the subject of the court's decision. Rather, the court specifically held only that *if*: (1) the very existence of an unfair labor practice hinges entirely on contract interpretation; *and* (2) the parties have set up a peaceful mechanism to resolve questions of contract interpretation; *and* (3) the parties have agreed there will be no strike unless and until that process has been exhausted, *then* a strike without first exhausting that process is a material breach of contract.

The Union's description of a "second" facet of the *Dow II* decision is also misleading. Contrary to the Union's assertion, the court did not reverse a holding of *Dow I* with respect to the doctrine enunciated in *Marathon Electric Mfg. Co.*, 106 N.L.R.B. 1171 (1953), *enforced sub nom. United Electrical Radio & Machine Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981. The *Marathon Electric* rule explicitly acknowledges the right of a company to exercise the traditional breach-of-contract remedy of cancellation where a union materially breaches its no-strike commitment. As the *Dow II* opinion explains, the court in *Dow I* pointedly questioned the doctrine (App. 20a) but remanded the case to the Board for its views. When the Board failed to address the issue, the court thought compelled for the first time to decide it.[5] The court there-

[5] In rejecting Board counsel's argument that it should once again remand the case to the Board for consideration of the *Marathon* doctrine, the court of appeals observed, *inter alia*, that it had "already sought, and did not receive, enlightenment from the Board" on that issue; that its "own careful review of the record" established that "the discharge of strikers and the termination of the contract could not be found to

upon addressed *Marathon Electric* squarely and ruled, as did the Board in its initial decision in this case, that the doctrine of material breach of labor contracts "continues to fill an important need in the law of labor contracts." (App. 21a).

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and not in conflict with other decisions. In addition, as the case now comes before this Court, this ten-year-old proceeding presents only a narrow factual question without significance for other cases. That there is no issue warranting review by this Court is buttressed by the fact that the agency primarily responsible for enforcing the Labor Act has decided not to request further review in this case.

1. The uniqueness of the factual setting in this case is plain from the record. Indeed, five years ago, when the Company sought a writ of certiorari to review the court of appeals' decision in *Dow I*, the Union responded in its brief in opposition that "[t]his case involves a unique set of facts and doctrines of law which are rarely invoked . . ." (Union Opp. Cert. at 6 in Sup. Ct. No. 75-1895). *Dow II* involves the same set of facts and doctrines of law as *Dow I*. The only real difference is that the court in *Dow II* realized "on considered reflection" that this case was not "an ideal vehicle for exploration of all the issues in the interrelationship between the law

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be unfair labor practices;" and that a "remand solely for consideration of a bargaining order at this late stage in the history of the Allyn's Point plant would not advance the cause of free choice in the selection of a bargaining representative." (App. 21a-22a).

of unfair labor practices and that of contract remedies which [the *Dow I* opinion) posed." (App. 22a).[6] Accordingly, the court in *Dow II* tailored its decision narrowly to the record before it and did not undertake to explore esoteric issues or establish any new legal principles. Instead, it merely adhered to long-standing judicial precedents defining the rights of employers faced with breach-of-contract strikes—precedents which, although cited infrequently in recent years, have not been overruled or modified by the Labor Board or any court.

2. Contrary to the Union's assertion, the decision below is entirely consistent with labor law principles enunciated by this Court. In particular, the decision of the court of appeals represents no departure from

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[6] The Company had petitioned this Court for review in *Dow I* because the court of appeals' decision appeared to interpret the federal labor policy favoring arbitration as imposing new preconditions which an employer would have to satisfy before resorting to traditionally-approved economic measures in response to a breach-of-contract strike. The Board successfully opposed the petition on the ground that the court had not held that the Company's responses to the strike were "necessarily unlawful", but merely remanded the case to the Board for further consideration. (See App. 3a, n.3). On remand, however, the Board reversed its earlier finding that the Union's strike violated the contract. In doing so, the Board eliminated the predicate on which the court of appeals had based its decision in *Dow I*. Hence, it never addressed the issues which had concerned the court and prompted the Company's certiorari petition. Consequently, those issues were not before the court in *Dow II*, and it concentrated instead on the narrow question of whether the Board had erred in finding, on this record, that the strike was not in breach of the contract. (App. 12a).

this Court's ruling in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In *Mastro Plastics*, this Court held that even though the parties had negotiated a broad no-strike clause which prohibited "any strike" during the term of the collective bargaining agreement, the union was not prohibited from striking to protest "those . . . unlawful practices destructive of the foundation on which collective bargaining must rest." 350 U.S. at 281. But in words that anticipate the facts here, this Court explained that the no-strike clause "expresses concern for the continued operation of the plant and has a natural application to strikes and work stoppages *involving the subject matter of the contract.*" 350 U.S. at 281, *cited at* App. 15a (emphasis added by Third Circuit).

The Board's subsequent interpretation of *Mastro Plastics* in *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802 (1961), is fully consistent with the language quoted above. The Board in *Arlan's* determined that not every discharge or unilateral action by an employer would be considered a material breach of the contract which would excuse a union from continued adherence to its no-strike obligations, since a union has a remedy which it may pursue by submitting the dispute to the grievance-arbitration procedure. 133 N.L.R.B. at 808. *See also Atlantic Richfield Co.*, 199 N.L.R.B. 1224 (1972) (unlawful unilateral changes in conditions of employment and resultant suspension of employees who refused work assignments, deemed non-serious unfair labor practice).

The interpretation of *Mastro Plastics* upon which the Board based its holding in *Arlan's* has been con-

firmed in decisions of this Court.[7] Thus, in *Drake Bakeries, Inc. v. Bakery & Confectionery Workers*, 370 U.S. 254, 265 (1962), this Court said, in explaining *Mastro Plastics*, that it "involved a *flagrant* unfair labor practice by the Company threatening the very existence of the union itself," and that "the parties could not have intended to waive the employees' right to strike over a *flagrant* unfair labor practice" (emphasis added). In 1974, this Court once again underscored the appropriate ambit of *Mastro Plastics* as applicable only to "unlawful practices destructive of the foundation on which collective bargaining must rest." *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974), *citing* 350 U.S. at 357.[8]

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[7] The *Arlan's* application of *Mastro Plastics*, so as to make unlawful strikes precipitated by discharge actions that could have been resolved through contractual grievance procedures, also has enjoyed substantial judicial approval among the lower federal courts for the last twenty years. See *Dow Chemical Company v. I.U.E.*, 82 L.R.R.M. 3169, 3181 (M.D. Fla. 1971), *aff'd*, 480 F.2d 433 (5th Cir. 1973), *cert. denied*, 415 U.S. 932; *Pence Construction Corp. v. Int'l Union of Operating Engineers, Local 450*, 484 F.2d 398, 401 (5th Cir. 1973), *cert. denied*, 414 U.S. 1144, *aff'g* 84 L.R.R.M. 2391 (S.D. Tex. 1972).

[8] The Petitioner's attack against the Third Circuit's interpretation of *Mastro Plastics* and *Arlan's* is based less upon legal arguments than upon a belated rehash of whether the Company's pre-strike activity constituted a "serious" unfair labor practice, thus triggering a statutory violation remediable by the Board. (Pet. Br. 13 n.11). The record on this matter, however, is clear: faced with the same case on two occasions, Board proceedings resulted in determinations that the Company's actions were "non-serious" and "serious," respectively. The court of appeals approved only one determination: the initial finding of non-seriousness. Accordingly, the Union's

Other decisions of this Court cited by the Petitioner are simply irrelevant to the facts of this case. Both *Drake Bakeries v. American Bakery & Confectionary Workers*, 370 U.S. 254 (1962), and *United Packinghouse Workers, Local 721 v. Needham Packing Co.*, 376 U.S. 247 (1964), concerned the survival of arbitration, not the employer's right to cancel the contract in the face of a material breach. Moreover, those cases concerned suits by unions to compel unwilling employers to follow arbitration procedures. In this case, on the other hand, it was the Union that spurned the opportunity for compromise, abandoned the grievance procedure as soon as it became clear it could not force capitulation in advance through that route, and struck the plant. The record is replete with evidence supporting the court of appeals' determination that the Company remained willing to arbitrate "even after expiration of the time limits specified in the contract. . . ." (App. 8a).

3. The Union's contentions that the decision below is in conflict with *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (10th Cir. 1980),[9] and with *NLRB v. State Electric Service, Inc.*, 477 F.2d

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complaint concerning an unremedied statutory violation, based on *Mastro Plastics* and *NLRB v. C & C Plywood*, 385 U.S. 421 (1967), is academic, because the court below *never* concluded that a serious unfair labor practice occurred.

[9] The *Northeast Oklahoma City* case enforced a Board decision issued on July 6, 1978, and published at 236 N.L.R.B. 1358. Yet, the Board did not rely on the administrative determination as precedent for its Supplemental Decision, and it was not discussed or even cited in any of the parties' briefs to the court of appeals.

749 (5th Cir. 1973), *cert. denied*, 414 U.S. 911, are without merit. Both of those cases, which were brought to the attention of the court of appeals but were not even cited, let alone discussed by the court (or the dissent), are plainly distinguishable.

In *Northeast Oklahoma City*, a group of employees struck in protest against their employer's repeated failure to comply with a contractual obligation to pay bonuses by the middle of each month. The employer immediately discharged all the strikers, claiming their walkout violated the no-strike clause of its labor contract. The Board found that the employer's repeated delays in paying the bonuses amounted to a unilateral change of working conditions and a modification of contract terms in violation of Sections 8(a)(5) and 8(d) of the Act. It went on to conclude that the discharge of the strikers violated Section 8(a)(3), because the circumstances brought the case within *both* of two rules: (1) the *Arlan's* rule that strikes over "serious" unfair labor practices are immune from general no-strike clauses, and (2) the *Marathon Electric* rule that a material breach of a labor contract by one party releases the other party from its obligation to perform. 236 N.L.R.B. at 1362 and nn.14, 15. In the latter regard, the Board reasoned that the employees were excused from their no-strike obligations because the Company's conduct constituted a prior material breach of the contract. These determinations were approved by the Tenth Circuit.

Northeast Oklahoma City, then, is a direct counterpart to this case. Here, the first and only material breach of contract was committed by the Union when it struck absent any precipitating serious unfair labor

practices.[10] The application of *Marathon*, of course, is consistent. Here, the Company was no longer obliged to adhere to its contract, any more than the

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[10] To the extent that the *Northeast Oklahoma City* decision rests alternatively on the finding that the employer's Section 8(a)(5) violation was a "serious" unfair labor practice under *Arlan's*, the facts emphasized by the Board and the court of appeals clearly differentiate that case from this one. One factor both the Board and the court stressed was the recurrent nature of the company's contract violations over a period of months. 631 F.2d at 671-72, 676; 236 N.L.R.B. at 1362. The management in that case kept promising that bonus payments would be made on time and then kept failing, month after month, to keep its promises. *Id.* at 671-72. Such a course of conduct could well be expected to create a sense of growing frustration among the employees. Thus, as the court saw it, the final event that triggered the strike was not just a unilateral change and a breach of contract, but was "[t]he apocryphal straw that broke the camel's back." *Id.* at 672 Further exacerbating the seriousness of the situation were the employer's repeated failures to notify the union when bonus checks would be late, and the employer's "demonstrated unwillingness to resolve the matter through the collective bargaining process." *Id.* Indeed, the court noted that when a union steward sought to discuss the problem with the company's president, he refused to meet with her. *Id.* at 672. These facts clearly set *Northeast Oklahoma City* apart from the ordinary run of cases involving "unwarranted bits of unilateral action." See *Arlan's Dept. Store of Michigan, Inc.*, 133 N.L.R.B. at 806 (1961), *quoting from* Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 17 (1958).

The case at bar, however, involved only a single, isolated instance in which management and union representatives disagreed on an issue of contract interpretation and management decided to adhere to its view, while recognizing the union's right to pursue a different resolution through the grievance

employees in *Northeast Oklahoma City* were required to comply with their no-strike pledge, after the other party's material breach.

The Union's attempts to draw parallels between this case and *State Electric Service* already have been satisfactorily refuted before in this case: once by the Administrative Law Judge (App. 150-51a) (whose decision was initially affirmed by the Board) and again by the Board's General Counsel in his initial brief before the Third Circuit on cross-application for enforcement of the Board's original order. The General Counsel's argument explaining the inapplicability of *State Electric Service* is reproduced in Appendix A, *infra*.

4. Finally, the Union suggests that the *Marathon Electric* rule itself is wrong and, presumably, that this Court should grant review to consider whether the rule is consistent with national labor policy. Since this case involves only the straightforward and unremarkable application of a 30-year-old rule of labor

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procedure. Unlike the management officials in *Northeast Oklahoma City*, the Dow Company's representatives neither broke any promises to the union nor refused to meet with it. On the contrary, they spent a total of at least *8 hours* at the table with the union's committee trying to resolve the dispute before the change was slated to take effect. See JA at 55, 110, 127, 248. They also clearly made known their willingness to continue seeking a binding resolution thereafter through that part of the bargaining process best-suited for resolving such issues—*i.e.*, the agreed-upon grievance and arbitration procedures. (*E.g.*, JA at 172, 190, 261, 397). This is not, therefore, a case like *Northeast Oklahoma City*, where the employer's "unwillingness to resolve the matter" could reasonably be found to have undermined the bargaining process itself.

law, in which there is no conflict with other circuits, this argument, we submit, is meritless.[11]

For the record, however, we note that the *Marathon Electric* rule is a crucial corollary to this Court's decision in *Boy's Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). In *Boy's Market*, which approved enjoining strikes in violation of no-strike commitments where a bargaining agreement specified mandatory arbitration, this Court expressly acknowledged that where, as here, mandatory arbitration is unavailable, self-help measures remain an appropriate avenue of relief. 398 U.S. at 248, n.17. This Court referred specifically to the right of employees to discharge participants in a breach-of-contract strike as a right which "of course . . . would remain available. . . ." *Id.*

This principle was reaffirmed in *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), when the Court made clear that "enforcing promises to arbitrate . . . was the limit of *Boy's Market*," and that the federal labor policy does not require or support any additional judicial regulation of the parties' "relationship pending arbitration"

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[11] In addition to the case at bar, the *Marathon Electric* rule has been confirmed by the federal courts on numerous occasions. *See, e.g., Children's Rehabilitation Center, Inc. v. Service Employees Union, Local 227*, 503 F.2d 1077 (3d Cir. 1974), *cert. denied*, 419 U.S. 1090; *Boeing Airplane Co. v. Aeronautical Industries Lodge No. 751, Int'l Ass'n of Machinists*, 188 F.2d 356 (9th Cir. 1951), *cert. denied*, 342 U.S. 821, *aff'g* 91 F. Supp. 596 (W.D. Wash. 1950); *Kellstone, Inc.*, 206 N.L.R.B. 156, *enf'd*, 493 F.2d 1352 (6th Cir. 1974); *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (10th Cir. 1980).

unless specifically provided for by their agreement. 428 U.S. at 411.

To be sure, federal labor policy prefers peaceful dispute-settlement methods over self-help remedies. At the same time, however, the availability of self-help remedies provides the underlying impetus upon which the collective-bargaining system functions. Well after *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court underscored the significance of having available self-help remedies, a primary example of which is the *Marathon Electric* rule. Thus, in *NLRB v. Insurance Agents International Union*, 361 U.S. 477 (1960), this Court observed that the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." 361 U.S. at 489.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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APPENDIX

Excerpt of NLRB Brief in *United Steelworkers v. NLRB*, 530 F.2d 266, Third Circuit No. 74-2163 (1976) (pages 33-35; citations omitted):

> "[*State Electric*] was decided on factual grounds—to wit, that there was no genuine breach of contract by the union. Thus, the Board found that the applicable no-strike clause was very limited and that it did not proscribe the strike engaged in by the union. Furthermore, the Board found that the strike occurred as a result of the company's failure to respond to the Union's request for recourse to the contractual procedure. 198 NLRB No. 77, 80 LRRM 1763, 1764-5 (1972). In addition, after the commencement of the strike the union still sought to resolve the dispute through the contractual procedures. On these facts, the Board found that "the union's conduct did not absolve the [company] from further obligation to deal with the union" and that the company violated the Act by repudiating the contract. None of the circumstances relied on by the Board in *State Electric* are present in the instant case. Moreover, in *State Electric*, as in *Needham*, *supra*, the fact that the union was seeking to work within the contract grievance machinery and that the employer refused to utilize that process was deemed to be of paramount importance.
>
> "On appeal, the Fifth Circuit held that substantial evidence supported the Board's findings and granted enforcement of its order. The Court went on to add its view that breach of a no-strike

clause does not *automatically* . . . terminate the entire contract (emphasis added) 477 F.2d at 752. Thus, the court implicitly recognized that in some circumstances breach of a no-strike clause would justify rescission. However, the court stated that under the circumstances present in *State Electric* there was not a sufficient justification to void the contract. The specific factors relied on by the court were the same ones emphasized by the Board. Thus the court stressed that the strike was clearly designed to force the company to acknowledge the existing dispute and comply with the contract procedures and that it was not an attempt to force the employer's acquiescence to an issue which the arbitrator could decide. 477 F.2d at 751. The Court summed up the case by concluding that it involved a situation in which an employer simply decided to take this opportunity to rid himself of the union once and for all. 477 F.2d at 752.

"In contrast, the instant case is not one in which the Company was trying to get rid of the union, for here there is no evidence whatsoever of anti-union animus on the part of the Company. Moreover, it was not the company but rather the union that refused to comply with the grievance procedure. The Company's cancellation of the contract was not a sudden or hasty decision. Thus the Company made strenuous efforts to persuade the union to resolve the dispute through peaceful means. During the three-way telephone conversation on June 4, Industrial Relations Manager Neering advised Union Representative McDermott "not to do anything foolish,

follow the grievance procedure." Once the strike began, the Company, in a series of letters, consistently advised the employees of its position that the proper means to resolve the dispute was through the grievance procedure and urged them to end the strike and complete the procedure. Additionally, the company's efforts to resolve the dispute through the state mediation procedure proved unsuccessful. At no time did the union give any indication that it would consider ending the strike and completing the grievance procedure. Thus, it can hardly be said (U. Br. 54) that the Union was seeking to achieve arbitration. On the contrary, its attitude and conduct prevented arbitration.

"In view of the Company's inability over a nine-week period to convince the employees to end the strike and complete the grievance procedure, and in light of the other factors which the Company believed were preventing it from returning the plant to normal, the Company was pushed to the point where contract rescission became an appropriate remedy. In sum, the Union's breach of contract here went to the very heart of the collective bargaining agreement and consequently, in the circumstances of this case, was the type of breach that justified rescission."

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No. 81-153

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
PETITIONER

v.

THE DOW CHEMICAL COMPANY AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

Page

Cases:

Arlan's Department Store of Michigan, Inc., 133 N.L.R.B. 802 ..... 3, 4, 5, 6, 7

Dow Chemical Co. v. *United Steelworkers*, cert. denied, 429 U.S. 834 4

Drake Bakeries Inc. v. *American Bakery & Confectionery Workers*, 370 U.S. 254 8

Marathon Electric Mfg. Corp., 106 N.L.R.B. 1171. aff'd *sub nom. United Electrical Workers* v. *NLRB*, 223 F. 2d 338, cert. denied, 350 U.S. 981 ..... 3, 8, 9

Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 ..... 5, 6, 7

NLRB v. *Northeast Oklahoma City Mfg. Co.*, 631 F. 2d 669 ..... 6, 8

NLRB v. *State Electric Service, Inc.*, 477 F. 2d 749 9

South Prairie Construction Co. v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 9

United Packinghouse Workers v. *Needham Packing Co.*, 376 U.S. 247 8

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) 3, 4
Section 8(a)(3), 29 U.S.C. 158(a)(3) 3
Section 8(a)(5), 29 U.S.C. 158(a)(5) 3, 4

Page

Miscellaneous:

Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958) 7

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner and respondent Dow Chemical Company were parties to a collective-bargaining contract which permitted petitioner to strike only after exhaustion of a five-step contractual grievance procedure and completion of arbitration or refusal by one of the parties to arbitrate (Pet. App. 146a).[1] In May 1971, Dow decided, for economic

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[1]The clause provides in relevant part (Pet. App. 5a, 95a n.4):

> The Union will not cause or engage in or authorize its members to engage in any strike against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, unless and until all of the Bargaining and Grievance Procedures outlined in this agreement have been exhausted.

reasons, to change the work schedule of 16 employees in the latex department of its Allyn's Point plant at Ledyard, Connecticut. Under the proposed change, instead of working seven consecutive days and then having two days off, Dow's employees would work five consecutive days and then have 2 days off. This change would have entailed a substantial loss of earnings for the employees involved (Pet. App. 131a-133a).

Dow refused to bargain about the decision to change the work schedule, arguing that the change was authorized by the management-rights clause in the contract (Pet. App. 133a-135a). Petitioner filed a grievance, protesting the refusal to bargain about the schedule change. The grievance was denied at each of the first four steps of the grievance procedure (Pet. App. 134a-135a). Dow refused to postpone implementation of the schedule change pending arbitration or to agree to immediate arbitration (Pet. App. 37a-38a). Petitioner failed to comply with the requirements of Step 5 of the grievance procedures or to make a written request for arbitration (Pet. App. 147a-148a). On June 7, 1971, the day the schedule change was to go into effect, all the employees in the plant went on strike (Pet. App. 135a-136a).

On August 9, 1971, Dow notified petitioner that because of the strike in breach of contract, it was cancelling the contract (Pet. App. 139a). On August 12, Dow notified the strikers that requests for reinstatement must be made by 4:00 p.m. on August 17 and that those who failed to request reinstatement by the deadline would no longer be employed by Dow (Pet. App. 139a-140a).

Ninety-five employees were fired and a majority of the remaining employees signed a petition stating that they did not want petitioner as their bargaining representative. Dow then notified petitioner that it had reason to believe that petitioner no longer represented a majority of the employees at the Allyn's Point plant and, consequently, would no

longer recognize petitioner as the bargaining agent at this plant (Pet. App. 141a).

2. In its decision (Pet. App. 121a-155a), the Board found that the contract did not authorize the unilateral change in the work schedule of the latex department and therefore Dow violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with petitioner (Pet. App. 143a-145a). It concluded, however, that this was not a sufficiently "serious" unfair labor practice to justify petitioner's breach of the no-strike clause (Pet. App. 149a). See *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802 (1961). Since petitioner had violated the contract, the Board held that its strike was not an activity protected by the Act.

The Board then considered whether Dow's subsequent conduct nonetheless converted petitioner's illegal strike into a valid unfair labor practice strike (Pet. App. 149a). The Board rejected the General Counsel's contention that the cancellation of the contract by Dow was an excessive response to the strike and therefore a violation of Section 8(a)(5) and (1). Instead, the Board found that cancellation of the contract was a justifiable response to petitioner's prior, material breach of the contract (Pet. App. 151a). See *Marathon Electric Mfg. Corp.*, 106 N.L.R.B. 1171 (1953), aff'd *sub nom. United Electrical Workers* v. *NLRB*, 223 F. 2d 338 (D.C. Cir. 1955), cert. denied, 350 U.S. 981 (1956).

The Board then considered whether the discharge of the strikers was a violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). The Board found that since the strike was unprotected activity at all times prior to the dismissals, Dow's actions were permissible (Pet. App. 152a-153a).

Finally, the Board found that the anti-union petition signed by the remaining employees created a reasonable

doubt about petitioner's majority status and therefore Dow did not violate Section 8(a)(5) and (1) by withdrawing recognition from petitioner (Pet. App. 153a-154a). Accordingly, the Board dismissed the complaint in its entirety (Pet. App. 122a).[2]

3. The court of appeals in its initial review of this case upheld the Board's findings that Dow's unilateral change in the work schedule was an unfair labor practice and that petitioner had failed to comply with the contractual prerequisites for instituting a strike (Pet. App. 101a). The court, however, remanded all other aspects of the proceedings.

Without deciding whether the Board's reliance on "serious" unfair labor practices as a predicate for finding the strike to be protected activity was a permissible interpretation of the no-strike clause (Pet. App. 115a-117a) or whether one party's breach of the contract generally should allow the other party to rescind the agreement (Pet. App. 117a-119a), the Court ordered the Board to reconsider the case "[i]n light of recent trends in labor policy" designed to eliminate what the court of appeals characterized as the "tooth and claw of industrial warfare" approach taken by Dow and approved by the Board (Pet. App. 120a).[3]

4. On remand, a majority of the Board held that it would retain the rule announced in *Arlan's Department Store, supra,* that only "serious" unfair labor practices justify a strike when there is a no-strike clause in the collective

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[2]With regard to Dow's violation of Section 8(a)(5) and (1) by its proposed unilateral change in the production schedule, the Board concluded that no remedial order was required because the change never had been implemented and petitioner no longer represented the employees in the latex department (Pet. App. 154a-155a).

[3]This Court denied Dow's petition for a writ of certiorari from that decision. *Dow Chemical Co.* v. *United Steelworkers,* 429 U.S. 834 (1976).

bargaining agreement (Pet. App. 31a-32a, 51a-59a, 79a-83a).[4] A majority also found that Dow's unilateral alteration in the work schedule was a "serious" unfair labor practice and thus petitioner had engaged in a protected unfair labor practice strike (Pet. App. 33a). The majority therefore concluded that Dow's actions in rescinding the contract, discharging the striking employees and withdrawing recognition from petitioner all were unfair labor practices (Pet. App. 36a-37a). The Board ordered Dow to bargain with petitioner and to offer all the strikers reinstatement with back pay (Pet. App. 43a-44a).

5. On review, the court of appeals denied enforcement of the Board's second order. The court again declined to pass expressly on the validity of the Board's use of "serious" unfair labor practices as the basis for deciding whether a strike is protected activity, but did hold that not all unfair labor practices justify a union's disregard of a no-strike provision in its contract (Pet. App. 16a-19a). The court held that this strike over conflicting interpretations of the collective bargaining agreement, which could have been resolved through the grievance and arbitration proceedings rejected by the union, violated the no-strike clause of the contract (Pet. App. 18a-19a). The court also declined to remand to the Board to allow it to consider whether petitioner's breach of contract justified Dow's rescission of the contract (Pet. App. 21a-22a). It held that the strike placed Dow in the position of either hiring replacements or shutting down, and that, because rescission of the contract required in

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[4]Chairman Fanning and Member Jenkins voted to overrule *Arlan's Department Store* on the ground that it was inconsistent with this Court's decision in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), and that it encourages employers to commit "non-serious" unfair labor practices thereby fostering labor unrest (Pet. App. 32a n.8). This was the same position then-Member Fanning asserted in his dissenting opinion in *Arlan's Department Store, supra*, 133 N.L.R.B. at 815, which was a decision by only a panel of three Board members.

order to hire replacements, this action was justified in this case (Pet. App. 22a).[5] Since petitioner had lost its majority status, withdrawal of recognition was also justified.

6. Petitioner first asks this Court to review the court of appeals' decision that its strike in response to Dow's unfair labor practice violated the no-strike clause in its contract. It contends that the decision is inconsistent with this Court's decision in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), and that it conflicts with the Tenth Circuit's decision in *NLRB* v. *Northeast Oklahoma City Mfg. Co.*, 631 F. 2d 669 (1980) (Pet. 12-14).

The scope of the issue presented by petitioner is not clear. It acknowledges that the issue of whether the Board's decision in *Arlan's Department Store* is consistent with this Court's decision in *Mastro Plastics* is not directly raised in its petition (Pet. 13 n.11). It concedes, however, that the validity of the Board's general rule may be called into question by any decision of this Court in this case (*ibid.*). To the extent that petitioner seeks in this petition to obtain review of the Board's rule in *Arlan's Department Store*, we oppose review of this case. The Board's decision that the holding of *Mastro Plastics* should apply only in cases of "serious" unfair labor practices is consistent with the analysis of this Court in *Mastro Plastics* and best effectuates the national labor policy.

This Court in *Mastro Plastics* was presented with "a flagrant example of interference by the employers with the expressly protected right of their employees to select their own bargaining representative." 350 U.S. at 278. Placing *Mastro Plastics* in its factual setting, the Board has taken

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[5]Judge Weis dissented. He agreed with the majority that the strike was in violation of the contract, but would have remanded to the Board to allow it to decide whether rescission of the contract was an appropriate response in this case (Pet. App. 23a-24a).

the view that this Court did not declare all unfair labor practice strikes permissible under a general no-strike provision, but instead merely "rejected the extreme application which the employers sought to give to the general no-strike clause in their collective bargaining contract * * *." *Arlan's Department Store, supra,* 133 N.L.R.B. at 805. Thus, the Board has held that only "serious" unfair labor practices immunize a strike against a no-strike clause. *Id.* at 807; Pet. App. 31a-32a. See Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 Mich. L. Rev. 1, 17-18 (1958).

The reason for limiting the scope of *Mastro Plastics* in this fashion is to encourage unions to resort to the arbitration process instead of striking over every insignificant contract breach committed by the employer. *Arlan's Department Store, supra,* 133 N.L.R.B. at 808; Pet. App. 32a. This policy judgment, impliedly upheld by the court of appeals, is one uniquely within the expertise of the Board and does not warrant review by this Court.

Petitioner, however, may be arguing only that the Third Circuit erred in not holding that Dow's unilateral change in the work schedule was sufficiently serious to justify its strike. This was the position the Board took on remand (Pet. App. 33a) and the Board believes that the court of appeals erred in overturning this decision. The Board, however, did not petition the Court for a writ of certiorari on this issue because it concluded that its dispute with the court of appeals is basically a factual one. In the Board's view Dow was primarily responsible for the labor dispute because of its refusal to delay implementation of the change in work schedule and its failure to press for an arbitral solution (*ibid.*). The court of appeals concluded that petitioner was primarily at fault for failing to pursue the grievance and arbitration procedures available to resolve a straightforward issue of contract interpretation (Pet. App. 18a-19a).

The Board believes that the court of appeals exceeded its permissible scope of review by substituting its judgment for that of the Board, and, if the petition for a writ of certiorari is granted with respect to this issue, the Board will defend its decision. Nonetheless, this issue may not be of general importance.[6]

7. Petitioner also seeks review (Pet. 15-17) of the court of appeals' decision that Dow could rescind the contract in response to petitioner's breach of the no-strike clause. It argues that the court of appeals' reliance on general contract principles in *Marathon Electric Mfg. Corp., supra,* is inconsistent with decisions of this Court favoring more orderly methods of dispute resolution than repudiation of the collective bargaining agreement. See *United Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964); *Drake Bakeries Inc.* v. *American Bakery & Confectionery Workers,* 370 U.S. 254 (1962).

The Board did not reach the issue of the continuing validity of the *Marathon Electric Mfg.* decision. Nonetheless, the Board asked the court of appeals to remand this case again to permit it to reevaluate whether rescission of the contract was an appropriate response to the breach of the no-strike clause in this case. The court of appeals erred

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[6]The Board does not believe that there is any clear conflict between the decision in the instant case and the Tenth Circuit's decision in *NLRB* v. *Northeast Oklahoma City Mfg. Co., supra.* The Tenth Circuit was more properly deferential to the Board with regard to its finding on the seriousness of the unfair labor practice involved in that case. Nonetheless, the conduct of the employer in *Northeast Oklahoma City Mfg. Co.*, involving repeated failures to pay bonuses which were a substantial portion of the employees' monthly wage, was a "material breach" of the collective bargaining agreement. 631 F. 2d at 677. The Board cannot state with confidence that the Third Circuit would have decided that case differently than did the Tenth Circuit.

in not remanding as proposed by the Board and by Judge Weis in his dissenting opinion (see page 6 note 5, *supra*).

The Board, however, did not petition for a writ of certiorari on this issue because the decision seemed to be based on factors peculiar to this case. The Board already had declined to pass on this very issue when it had the opportunity after the first remand, the case is unusual in that no injunction against the strike could be obtained due to the lack of a mandatory arbitration clause, and the case already is ten years old.

Nonetheless, if the petition for a writ of certiorari is granted, the Board will take the position that the case should be remanded to it for a determination of the continued validity of the *Marathon* doctrine and its applicability to this case. As it stands now, this question is not ripe for review by the Court.[7] It would be more appropriate for the Court to wait until the Board has had an opportunity to reconsider the doctrine in order to have the benefit of the Board's considered judgment as to what remedy for breach of a no-strike clause best effectuates the national labor policy. See *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-806 (1976).

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[7]Petitioner argues that the issue requires immediate resolution because it conflicts with the Fifth Circuit's decision in *NLRB* v. *State Electric Service, Inc.*, 477 F. 2d 749 (1973). Although the Fifth Circuit's opinion contains language broadly rejecting the *Marathon Electric* case, it is only an alternative holding and thus does not present a true conflict between the circuits. Moreover, the Fifth Circuit merely rejected the rule that a union's breach of the no-strike clause "automatically" justifies rescission. 477 F. 2d at 751. The Third Circuit's decision is not based on an automatic rescission rule, but rather examines the specific situation involved in this case and concludes that on this record rescission of the contract by the employer was justified (Pet. App. 21a-22a). The court's general expression of approval for the *Marathon Electric* decision does not convert this essentially narrow factual determination into a broader holding requiring review by this Court.

CONCLUSION

Although both questions presented by petitioner involve errors committed by the court of appeals, they do not necessarily raise issues warranting review by this Court.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF AUTHORITIES

Cases: Page

Arlan's Department Stores of Michigan, Inc., 133 NLRB 802 (1961) 2

Drake Bakeries Inc. v. American Bakery & Confectionary Workers, 370 U.S. 254 4

Marathon Electric Mfg. Corp., 106 NLRB 1171 (1953), aff'd sub nom. United Electrical Workers v. NLRB, 223 F.2d 338 (CA DC 1955), cert. denied, 350 U.S. 981 ..... 4, 5

Mastro Plastics v. Labor Board, 350 U.S. 270 .... 1, 2, 3

NLRB v. Northeast Oklahoma City Mfg. Co., 631 F.2d 669 (CA 10 1980) 3

NLRB v. State Electric Service, Inc., 447 F.2d 749 (CA 5 1973) 4

United Paperworkers v. Needham Packing Co., 376 U.S. 247 4

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1. The submissions of the Company and of the Board suggest that the first issue presented in the petition—the *Mastro Plastics v. Labor Board*, 350 U.S. 270, issue—is one of fact as to which there is no conflict in the circuits. But the issue is one of law on which two circuits are in direct conflict.[1]

[1] The facts that frame the issue are undisputed and far from unique. In mid-term of a collective agreement, the Company unilaterally determined to take an action that would have significantly affected the wages and working conditions, including a substantial loss in earnings, of 16 employees. The Union insisted that the Company had a *statutory* duty to bargain with the Union over whether that change should be made. The Company claimed that it had a *contractual* right to make such a change without bar-

This Court in *Mastro Plastics* ruled that a no-strike clause virtually identical to that here did not "waive the employees' right to strike against the unfair labor practices committed by their employers." 350 U.S. at 279. The court below, without purporting to overturn the Board's finding that the Company had committed a "serious" unfair labor practice, ruled that the doctrine of *Mastro Plastics* "does not apply" where "the very existence of [the unfair labor practice] depends upon competing interpretations of a contract, either one of which would be valid." Pet. App. 16a, 19a. Under that approach, no matter whether the Company's unfair labor practice was "serious" or "non-serious", the Company's bare assertion of a contractual defense to the claim that it violated its statutory duty—a defense which the Board, affirmed by the court below, found to be without merit—was sufficient to place a strike in response to that unfair labor practice within the ambit of the Union's no-strike commitment.

The issue, then, is simply whether the legal standard announced by the court below—the exception that court created to this Court's *Mastro Plastics* doctrine—is valid. That is not as the Company would have it "a narrow factual question." Dow Br. at 8. And the question presented is not, as the Board would have it, either (1) a challenge to the Board's rule in *Arlan's Department Stores of Michigan, Inc.*, 133 NLRB 802 (1961)—that a no-strike clause of the type here waives the statutory right of employees to strike against "non-serious" un-

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gaining with the Union. The contract contained a grievance-arbitration procedure through which the validity of the Company's alleged contractual right—its defense to the Union's claim that it had a statutory duty to bargain—could have been determined, but the Company insisted on implementing the change prior to the completion of that procedure, and the Union thereupon struck to protest the Company's *statutory* violation. The contract contained a general no-strike provision which did not expressly apply to unfair labor practice strikes.

fair labor practices but not the right to strike against "serious" ones; or (2) a difference with the court of appeals as to whether "Dow's [unfair labor practice] was sufficiently serious to justify [the] strike." Board Mem. at 6-7. As the Board recognized at an earlier point in its memorandum, "[t]he court . . . declined to pass expressly on the validity of the Board's use of 'serious' unfair labor practices as the basis for deciding whether a strike is protected activity. . . ." Board Mem. at 5. And for that very reason that court did not have any occasion to determine whether the Board was correct in finding a "serious" unfair labor practice. The court adopted a rule of law different from the rule followed by the Board, and the court's rule of law is the subject of the first question in instant petition.

Thus, on this issue the decision below is squarely in conflict with the decision of the Tenth Circuit in *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (CA 10 1980). In *Northeast Oklahoma*, as here, "the very existence of [the unfair labor practice over which the mid-contract strike occurred] depend[ed] upon competing interpretations of a contract, either one of which would be valid"—interpretations which could have been resolved through a contractual grievance-arbitration process. See 631 F.2d at 673-675. But there, unlike here, the court upheld the Board's determination that the strike was protected conduct under the doctrine of *Mastro Plastics*. Had the Tenth Circuit followed the rule of the court below it would have reached the opposite result on this issue.[2]

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[2] The Board suggests that the employer's initial unfair labor practice might have been more "serious" in *Northeast Oklahoma*, and that therefore the cases are not in "clear conflict." Board Mem. at 8, n. 6. Given, however, that the analysis of the court below does not depend on the "seriousness" of the employer's unfair labor practice, the difference offered by the Board, even were it correct, does not distinguish the cases.

2. The Board's memorandum contains two points in response to the second issue presented in the petition—whether a Union's breach of a contractual no-strike provision entitles the employer unilaterally to cancel the entire collective agreement—that can only be characterized as disengenuous.

First, the Board in its memorandum, while not disputing the inconsistency of its *Marathon Electric* rule with this Court's decisions in such cases as *Drake Bakeries Inc. v. American Bakery & Confectionary Workers*, 370 U.S. 254, and *United Paperworkers v. Needham Packing Co.*, 376 U.S. 247, does state that the decision of the court below approving that rule is not "a true conflict" with the decision of the Fifth Circuit in *NLRB v. State Electric Service, Inc.*, 477 F.2d 749 (Ca 5 1973). Board Mem. at 9, n.7. Acknowledging that the Fifth Circuit's decision "rejected the rule that a unions' breach of the no-strike clause 'automatically' justifies rescission," and that the court below "approv[ed]" the *Marathon Electric* rule (which the Board describes as "automatically giving the employer the right to terminate the contract for a strike in breach of contract", Pet. App. at 36a, n. 13), the Board rests its contention on the ground that the conflicting holding of the Fifth Circuit is "only an alternative holding." Board Mem. at 9, n.7. By that characterization, the Board apparently has reference to the fact that this holding was one of two grounds upon which the Fifth Circuit rested its decision. See Pet. at 16, n. 13. But such a holding is not a *dictum* and, like any holding, states the rule of the Circuit. Thus, on this issue the rule of the Fifth Circuit and the rule of the Third Circuit are in direct conflict.

Second, the Board's memorandum states that "if the petition for a writ of certiorari is granted, the Board will take the position that the case should be remanded to it for a determination of the continued validity of the

Marathon doctrine and its applicability to this case." Board Mem. at 9. But the course of this proceeding shows that the Board has no disposition to reconsider the validity of the *Marathon* doctrine. As the Company points out, the Board has followed that doctrine for nearly 30 years. Dow Br. at 15. The Third Circuit in its first decision in this case disapproved the Board's reliance on *Marathon* in this case, and remanded the issue with instructions that the Board reconsider its position. The Board did not respond to those instructions: "As we have found the strike here to be protected, we do not address ourselves to the *Marathon* rule at this time." Pet. App. at 36a, n.13. Now that the Third Circuit has approved the *Marathon* rule, there is nothing to suggest that the Board has any independent inclination to reconsider the rule, and there is therefore no basis for the remand that the Board states it will request.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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